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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NOVA SCOTIA.

REPORTED BY

BENJAMIN RUSSELL, M. A.,

AND

JOHN M. GELDERT, Jr., LL. B.,

Barristers-at-Law.

VOLUME III.

1881-82.

HALIFAX, N. S.:
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1884.

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JUDGES OF THE SUPREME COURT

DURING THE

PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

Chief Justice.

THE HONORABLE JAMES McDONALD.
(Appointed May 20th, 1881.)

Judge in Equity.

THE HONORABLE ALEXANDER JAMES.
(Appointed Assistant Judge January 8th, 1877. Appointed Judge in Equity July 24th, 1882.)

Assistant Judges.

THE HONORABLE HUGH McDONALD.
(Appointed November 5th, 1873.)

THE HONORABLE HENRY W. SMITH.
(Appointed January 15th, 1877.)

THE HONORABLE ROBERT L. WEATHERBE.
(Appointed October 7th, 1878.)

THE HONORABLE SAMUEL G. RIGBY.
(Appointed December 17th, 1881.)

THE HONORABLE JOHN S. D. THOMPSON.
(Appointed July 24th, 1882.)

Attorneys General.

THE HONORABLE JOHN S. D. THOMPSON.
(Appointed October 22nd, 1878.)

THE HONORABLE ALONZO J. WHITE.
(Appointed August 3rd, 1882.)

ERRATA.

Page 19, second line of head-note, for "and" read "who."
" 25, second line of head-note, for "County" read "City."
" 266, second line of head-note, for "for less" read "of less."
" 428, for "*was*" in the italic headline read "*not.*"

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CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM

DECEMBER 1881, TO APRIL 1882.

FLETCHER *v.* CHISHOLM.

Before McDONALD, C. J., and McDONALD, SMITH, JAMES and WEATHERBE, J J.

(Decided December 16th, 1881.)

Relief of Insolvent Debtors.—Appeal Court irregularly organized.—Certiorari quashed.

A DEBTOR was imprisoned on process issued out of the County Court and was brought before commissioners who ordered his discharge. An appeal was taken to a Court organized under the Act of 1880, cap. 2, sec. 111, but the order, though made by the Clerk of the County Court, was signed by him as Prothonotary. The proceedings were brought up by certiorari and a rule taken to quash the certiorari on the ground among others that as the special Court had not been regularly organized it had no jurisdiction and certiorari would not lie.

Held, that the certiorari must be quashed. See *O'Connor* v. *Condon*, p. 2, *note*.

The defendant Chisholm was arrested under a writ of capias issued out of the County Court, Truro. He was discharged from arrest by commissioners under the act for the relief of insolvent debtors and an appeal was taken from their decision to a Court composed of three justices. The justices decided to affirm the discharge on the defendant making the assignment required by the act. The counsel of the plaintiff asked for an hour's time to consult with his client, and during that time issued a writ of certiorari. The summons under which the debtor was brought before the commissioners for relief was signed, A. B. and C. D., "Commissioners," without any further description of their

office. The special court was constituted by the officer who acted as both Clerk of the County Court and Prothonotary of the Supreme Court, and the order was signed by him as "Prothonotary." An application was made to the learned Chief Justice, in vacation, to set aside the certiorari, but his lordship held that he had no jurisdiction to act in the matter in vacation. Another application was made after vacation, but his lordship held that it should be made to the full Court. The matter eventually came before the full Court on a rule *nisi* to quash the certiorari upon the grounds that appear in the argument of counsel.

J. J. Ritchie, for rule.—The grounds on which the writ issued were insufficient. The original summons was properly signed. The signatures of the commissioners were sufficient. 9 *M. & W.*, 12. A writ of capias is a writ of mesne process. *17 U. C. C. P.*; 675. The third ground for the certiorari was that defendant's schedule was insufficient. This is negatived by defendant's affidavit. That was a matter peculiarly for the justices. *Queen* v. *Bolton*, 1 Q. B., 66; *Chipman's Notes*, 111; *10 Pickering*, 358. It was too late to serve the writ of certiorari. *Gallagher* v. *Beatty*, 1 Rob. & Jos. Dig., 641; *Hemes* v. *Reeves*, 5 Ont. Prac. Rep., 58.

The decision of the special court is made final by act of 1880, chapter 2, section 111. *Ex parte Richards*, 2 Pugsley, 6, shows that where a party elects his tribunal in such a case as this he must abide by its decision. The statute designates how the special court shall be convened. The order appointing the Court was irregular, the Clerk of the County Court having signed the order not as clerk but as prothonotary. In *O'Connor* v. *Condon* * it was decided that where the Court

---

O'CONNOR *v.* CONDON.*

THIS, cause having been decided at a special session of the Court, did not come to the knowledge of the Reporters until it was too late to insert the decision in its proper place.

SIR WM. YOUNG, C. J., now, (November 4th, 1879,) delivered the judgment of the Court:—

This case, with its multitudinous papers, turns upon a single point, whether the plaintiff, under all the circumstances, was entitled by writ of certiorari to bring the case here in order to raise the very important question of the Provincial Act of 1878, chapter 8, being valid or *ultra vires*. The Court has treated it as valid, but the point is still open when brought properly before us, and the decisions in New Brunswick and Prince Edward Island will then receive the consideration they justly merit. Our attention at present is directed mainly to

below had no jurisdiction certiorari would not lie. The statute not being followed in every respect in the constitution of the court, it was not a court at all.

The bail-piece is bad. It is given to respond a judgment to be finally given on a certiorari to remove proceedings from a Court convened under chapter 137 *R. S.*, whereas it should have been under Acts 1880, chapter 2, section 111.

Graham, Q. C., contra.—The motion to set aside the certiorari is too late. It is not before the Court that previous applications were made, and it is no excuse that the party mistook his remedy. As a matter of law we are entitled to a certiorari. There is no appeal from the Justices sitting as a Court of Appeal. If the Court sits without jurisdiction certiorari lies even where in other cases it is expressly taken away. (McDONALD, C. J.—I can quite understand that, where the justices have jurisdiction though not in the particular case. Here it is contended that there was no Court. If the objection to the manner in which the Court was convened is valid, my difficulty is that they were absolutely without jurisdiction.) As to our right to certiorari, see *3 Dowling's Prac. R.*, 90; *2 Exch.*, 538; *1 Salk.*, 148; *6 Exch.*, 184; *3 R. & C.* 32; *L. R. 5 Q. B. D.*, 179; *9 Am. Reps.*, 815. In *1 Oldright*, 525, it was decided that the order for the certiorari may be absolute in the first instance. It is only necessary for the party to make out a *prima facie* case. If this is done the writ cannot be set aside as improvidently issued, no matter how many persons may controvert the facts. There is no remedy by writ of error, and it is necessary that there should be a remedy. The party admitted that there were properties encumbered and unencumbered which were not included in his schedule. In *Crawley* v. *Anderson*, 1 N. S. Dec., 385, it

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the form of proceeding. The defendant, an insolvent debtor, on an execution out of the County Court, was discharged by two Commissioners under the act of 1878, section 4. Under that section the plaintiff appealed to the Judge of the County Court while protesting against his jurisdiction. But if the act of 1878 is *ultra vires* the plaintiff might have equally protested against the action of the Commissioners. He has taken a further step affecting his right, as in *3 U. C. Practice Cases*, 354. But it seems from the case of *O'Brien* v. *Welsh*, 28 U. C. Q. B., 394-402, that where there is no jurisdiction in the inferior Court, which is the plaintiff's contention here, the whole proceedings are void and certiorari will not lie. It is not for us to point out what proceedings, if any, would lie under the statute to which we were referred. It is enough that we feel ourselves constrained to quash this certiorari, leaving the parties to their several remedies. We make the rule absolute but without costs.

McDONALD and JAMES, J J., concurred.

was held that certiorari lies in all cases before judgment. We have the writ as a legal remedy, and, on the face of the proceedings, ground sufficient to uphold it.

In *7 El. & Bl.*, 660, because a jury in assessing damages considered certain items they should not have done, certiorari was allowed. A defect in a commission appointing a Judge to act in a certain particular does not deprive him wholly of jurisdiction, so as to deprive him of protection. It is enough that the Court sits *de facto*. There is a statute enabling the justices to sit. The error in calling the Court together was a mere irregularity. *Clarke's Crim. Law*, 563. The Court was convened under chapter 137 *R. S.* There is nothing in the act of 1880 to divest the jurisdiction so conferred.

J. J. Ritchie.—In reference to the question of delay in moving, I applied on the first possible opportunity. There is no distinction between this and *O'Connor* v. *Condon*. A statute conferring jurisdiction must be strictly construed and all conditions complied with.

The COURT, now, (December 16th, 1881,) pronounced judgment, quashing the writ of certiorari and awarding a procedendo.

DEWOLFE *v.* HOLMES.

Before McDONALD, C. J., and McDONALD, JAMES and WEATHERBE, J J.

(Decided December 17th, 1881.)

Opening judgment by default.—Accounting for delay.—Defence on the merits.

JUDGMENT by default was set aside in an ejectment suit where the affidavits disclosed a defence on the merits without alleging in terms that the defendant had a defence on the merits, and the want of a plea was accounted for by defendant's attorney swearing that in consequence of an appeal from an order for security for costs in the cause and of several papers in the cause being served on his counsel in Halifax, he was misled as to the position in which the cause stood and was not aware that the suit was in a position in which judgment could be marked, until a levy was made on defendant's property. Plaintiff's attorney, in reply, swore that the rule absolute setting aside the order for security had been forwarded for service on defendant's attorney and that for this and other reasons, which he detailed, the statement of the attorney as to his having been misled could not be true.

Held, (WEATHERBE, J. *dubitante*,) that the appeal from the judgment setting aside the default must be dismissed.

This was an appeal from a decision of SIR WILLIAM YOUNG, C.J., making absolute a rule setting aside a judgment by

default. The grounds of appeal are given in the rule as follows:

1. That the defendants have not accounted for their non-appearance.

2. The defendants have not sufficiently accounted for their delay in pleading.

3. Defendants have not sufficiently disclosed a defence upon the merits with the particular grounds thereof.

4. The allegations in the affidavits in support of the rule were fully met and negatived by the affidavits in opposition thereto.

5. The defendants, having appeared, were not entitled to have judgment opened up after default for want of plea.

6. Defendants were not entitled to have the judgment opened after so great a delay in making application therefor;

7. And on the grounds appearing in the affidavits and papers herein.

The action was brought to recover possession of lands at Parrsboro'. The writ contained counts in trespass and ejectment. The defendants obtained from the Prothonotary at Amherst a rule for security for costs, which was set aside by SMITH, J., on appeal. The order setting aside the order for security for costs was served on the defendant's attorney on on the 23rd December, 1879, and on the 27th December, 1879, judgment by default was marked for want of plea, and judgment entered thereon on September 11th, 1880. A *nolle prosequi* was previously filed on the 26th April, 1880, on the trespass count.

The following are the affidavits in which defendants accounted for want of a plea and disclosed a defence on the merits:

I, Daniel Y. Holmes, of Parrsboro', in the County of Cumberland and Province of Nova Scotia, Trader, one of the above-named defendants, make oath and say that this is an act of ejectment brought by the above plaintiffs against me and my co-defendant, the said J. Hibbard Holmes, to recover possession of certain lands and premies situate at Parrsboro' aforesaid, leased by me from John T. Smith, of Amherst, in said county

Barrister-at-Law, and of which I have been in possession and occupation for the past three years or thereabouts.

2nd. I say that on being served with the writ herein I handed the same to the said John T. Smith to attend to, who informed me that he intended contesting the right of plaintiffs to the said property, and would take the necessary steps to try the title thereto, and I accordingly paid no further attention to the matter.

3rd. I say that I was not aware until a day or two since but that the said cause was being defended, when the Deputy Sheriff came with an execution and levied on property of my co-defendant for some sixty-three dollars for costs of suit, &c., herein, and put one Thomas L. DeWolfe in possession of the said property for plaintiffs; and the said property so levied on is now advertised to be sold on Saturday next, the second of October.

I lastly say that the said J. Hibbard Holmes is my son, and had nothing whatever to do in witholding possession of the said property, and, as I am advised, should not have been made a co-defendant with me herein.

I, Charles R. Smith, of Amherst, in the County of Cumberland, Barrister-at-Law, and attorney of the defendants, herein make oath and say as follows:

1st. I say that this is an action commenced in this Honorable Court at Halifax on the twenty-second day of August, A.D., 1879, against said defendants for tresspass on certain lands at Parrsboro', and to recover possession thereof, as will appear by a copy of the Writ of Summons hereto annexed marked "A." That I duly appeared thereto as Attorney of defendants; and after demanding from plaintiffs security for defendants' costs I applied to and obtained from the Prothonotary of said Court in Amherst an order therefor.

2nd. I say that an appeal was taken from the decision of said Prothonotary and his decision reversed as will appear by a copy of the order granted herein and hereto annexed marked "B."

3rd. I say that when said appeal was taken I forwarded the papers in said cause to Messrs. Meagher, Chisholm & Ritchie, practising Barristers in the city of Halifax, to attend

to for me; and in consequence of said appeal and some of the papers herein having been served on my said counsel in Halifax, I was misled as to the position in which said cause stood, and in consequence thereof I did not plead thereto, and the first intimation I had of the said cause being in a position to mark judgment was from information received from one of the defendants that a levy had been made on his property.

4th. I say that, as will appear by the Writ annexed, a count in tresspass on the described land and premises as well as the count in ejectment is contained and set out therein, but that after the granting of the rule absolute for security for costs, to wit, on the twenty-sixth day of April, A.D, 1880, a *nolle prosequi* as to the said tresspass count was filed with the Prothonotary of said Court at Amherst.

5th. I say that from personal knowledge I know that John T. Smith, of Amherst, aforesaid, Esquire, is the real defendant in said cause, and that he has a deed of the land and premises in dispute, and that he fully intended to defend the said cause, and that it was not from any disposition on his part not to have said cause contested, but entirely through a misapprehension as to its position and that of said counsel in connection therewith, that a fresh application for security for costs had not been made and a defence put in which would have decided the title of the said John T. Smith to the said lands and premises, and I am fully satisfied that great injustice will be done said John T. Smith unless he is allowed to come in and defend said suit.

I, John T. Smith, of Amherst, in the County of Cumberland, Barrister-at-law, at present of the city of Halifax, make oath and say that this action, brought to recover possession of certain lands and premises, situate at Parrsboro', in said county, conveyed to me by the executors of the last will and testament of the late E. D. W. Ratchford, deceased, by deed bearing date the 26th day of February, A. D. 1878, hereto annexed, marked "A," and by me leased to the above-named defendant, Daniel Y. Holmes, shortly thereafter, and of which said defendant has ever since, until dispossessed a few days since, had possession as my tenant, the other defendant,

J. Hibbard Holmes, so far as I am aware, having nothing whatever to do therewith.

Secondly. I say that as appears by the registry of deeds at Parrsboro', aforesaid, a deed of the said lands and premises purports to have been made at Liverpool, England, by the said E. D. W. Ratchford and his wife in his lifetime, on the eighteenth day of March, A. D. 1858, to one John Myers and John Starr DeWolfe, as Trustees for the Royal Bank of Liverpool, the consideration therefor as set out in said deed being five hundred pounds, but that the said deed was never proved for registry until the nineteenth of February, A. D. 1877, nor recorded until the eigth day of the following March, and that such proving and recording was some time after the death of the said E. D. W. Ratchford who died on or about the eighteenth day of April, A. D. 1874.

Thirdly. I say that as advised, and which I verily believe, the said E. D. W. Ratchford continuously from the time of making or date of the said deed of March, 1858, up to his decease, by himself or his agents, remained in the occupation and possession of the said lands and premises and used and enjoyed the same, and that the said trustees or their representatives did in no way whatever interfere therewith, and the first intimation of any such conveyance as that of March, 1858, being in existence, so far as I am aware, was the registration of said deed, and which only came to my knowledge sometime after my said purchase.

Fourthly. I say that as advised, and which I believe, the above named plaintiffs, with the exception of the said Royal Bank of Liverpool, are the children and heirs at law, and the husbands of some of them, of one of the alleged trustees, John Starr DeWolfe, now deceased, and that the said cause is being conducted and prosecuted by and at the instance of one Thomas L. DeWolfe, at present of Parrsboro' aforesaid, who, since the judgment herein, has taken possession of the said lands and premises.

Fifthly. I say that a license to sell the real estate of the said E. D. W. Ratchford on account of the present assets of his estate being insufficient to pay the debts, was duly and regularly granted, and that thereunder the said lands and premises were regularly advertised for sale according to law,

and were knocked down to me at the sale thereof as the highest and best bidder, and the consideration money therefor having been paid by me, the deed thereof properly executed by the said executors and proved for registry, was delivered to me by them, and which said deed was duly recorded in the office of the Registrar of Deeds at Parrsboro' aforesaid, in which district the said lands and premises are situate, on the twenty-third day of December, in the year 1878.

Sixthly. I say that, believing my title to the said lands and premises to be good, I fully determined to try the claim of plaintiffs thereto, and instructed my attorney herein accordingly, who caused an appearance therein, and obtained a rule absolute to compel plaintiffs to give security for costs, and I fully supposed that the proper steps had been taken by him or the counsel in Halifax to prevent any judgment being entered without a trial first being had, or that a further application for such security would be made, the decision on appeal from that of the Prothonotary, reversing same, having been given on some technical grounds, and I can only account for the matter not having been attended to for the reason that the papers were served on the counsel in Halifax instead of my said attorney, thereby misleading him as to the position in which my said suit stood.

Seventhly. I say that the first intimation I had that the said cause was not stayed for want of security for costs, or that a defence had not been put in was a notice from the defendant, Daniel Y. Holmes, received a few days since, informing me that the deputy sheriff had levied on property of his co-defendant for costs of judgment recovered by plaintiff herein, and had put one Thomas L. DeWolfe in possession of the said lands and premises, and, on examining at the office of the Registrar of Deeds at Parrsboro' aforesaid, I discovered that a judgment in ejectment herein, purporting to have been recovered on the eleventh day of September last, in favor of plaintiffs for the said lands and premises, and forty-nine dollars and fifty-two cents had been recorded in that office.

Eighthly. I lastly say that the property so levied on was advertised to be sold on the second instant, but at my instance the sheriff postponed the sale thereof until the twelfth of this month, and I ask that an order staying the proceedings herein,

and giving me leave to defend the said cause may be granted as provided by law.

The following affidavit, among others, was read in reply :

I, Jonathan Parsons, of the City and County of Halifax, Barrister, the Attorney of the Plaintiffs in this cause, being duly sworn make oath and say as follows :

1. First I say that this action was commenced by writ of summons issued out of this Honorable Court August 22nd, 1879, which was subsequently served upon the defendants as stated by the Sheriff of Cumberland County in his return on said writ. That on the 29th day of September, 1879, Charles R. Smith, Esquire, caused to be served on me an appearance for the above-named defendants, and also a demand for security for their costs, and a few days after a rule *nisi* for security for costs. Said rule was made returnable before the Prothonotary at Amherst, who subsequently made the same absolute; but the affidavit of John T. Smith at that time, (the only affidavit that referred at all to the merits,) failed to make it appear to the satisfaction of the Judge that there were sufficient merits in the defence, and an application for a re-hearing before a Judge at Chambers at Halifax was made, and after argument the order of the Prothonotary was discharged with costs by rule absolute dated the 23rd day of December, A.D., 1879.

The Summons for a re-hearing of the Prothonotary's order together with a copy of the affidavits on which it was granted was forwarded by me to William F. Cutten, Esquire, acting magistrate at Amherst, and he made affidavit of having served the same upon said Charles R. Smith, Esquire, personally.

2. Secondly I say that when the rule absolute, dated 23rd of December, 1879, was obtained I forwarded it with a copy for service together with a notice of taxation of costs to said William F. Cutten for service upon said Charles R. Smith, and service I have been informed and verily believe was effected upon said Charles R. Smith personally. The affidavit of service of said notice of taxation is hereunto annexed marked " A."

3. Thirdly I say that costs were taxed on said rule herein, on the 13th day of January last past, and I wrote to

said Charles R. Smith, Esquire, Attorney of defendants, stating the amount, and asking if defendants would pay without an execution being issued, and received a post card in reply which is hereunto annexed marked "B." In February I received from said Charles R. Smith, the post card hereunto annexed marked 'C." These communications seemed to indicate that the defendants herein were the employers of Charles R. Smith, and to them he was looking for the costs. But at the argument of the rule *nisi*, before the Prothonotary at Amherst, John T. Smith, Esquire, took a prominent part in the argument, who to my objection, stated that he was personally interested in this suit, having leased the same to the defendants, and besides he was a barrister and attorney of this court, and was counsel with the defendants herein.

4. Fourthly I say, that the said costs were not paid, and on or about the first of June last past, I was compelled to issue exection for the collection of the same, and the sum for which execution issued has not been all paid to me yet by the Sheriff of Cumberland County to whom it was sent.

5. As appears by affidavit on file in the Prothonotary's office in Amherst, made by said William F. Cutten, said rule absolute dated December 23rd, A.D., 1879, was served personally on said Charles R. Smith, and three days afterwards a default was duly marked for want of pleas by the Prothonotary at Amherst. This cause was not allowed to slip from the memory of ether the defendants or their attorney, or the said John T. Smith, as the facts detailed herein, and in the affidavits of William F. Cutten, the Prothonotary at Amherst, and Sheriff MacLean fully shew.

6. Sixthly I say that I never served or caused to be served in this cause any rule, paper or affidavit herein on any other person than Charles R. Smith, Esquire, the attorney on the record of said defendants, I never served or caused to be served, any paper herein on Messrs. Meagher, Chisholm, and Ritchie, or any one else, except the said Charles R. Smith, and the statement of said Charles R. Smith, in the third paragraph of his affidavit, to the effect that he was misled as to the position in which said cause stood by the service of papers upon others instead of upon him, cannot be true.

7th. Seventhly I say that the judgment herein was duly entered up at Halifax, and a transcript thereof sent by me to said William F. Cutten to be entered in the judgment book of this Court at Amherst, and it is so entered on the seventeenth day of September, 1880, in book "P," pages 838 and 839, and I was informed by the Prothonotary at Amherst, Edward B. Blenkhorn, Esquire, in the presence of William F. Cutten, Esquire, that said Charles R. Smith, Esquire, had seen said judgment in his office at the time, so he thought, that said transcript of judgment was being entered in the book by him. The said Prothonotary further informed me that said Charles Smith, Esquire, is and has been in the habit of coming into his (the said Prothonotary's) office every few days and examining the Judgment Book and other papers therein, as do the other lawyers at Amherst.

Graham, Q. C., in support of rule for appeal.—Mr. Smith, the attorney of the defendants, accounts for not putting in pleas by stating that certain papers were served on Meagher, Chisholm and Ritchie. Mr. Parsons denies that the papers were served on Meagher, Chisholm, and Ritchie. (McDONALD, C. J.—The only question for us is what Mr. Smith knew and whether he negligently left unfulfilled any duty he owed to his client. McDONALD, J.—The question is not whether there was any irregularity, but whether there is a defence shown such as will justify us in opening up the matter. McDONALD, C. J.—The Court would like to hear you on the point as to whether the words of the statute have been complied with, and a defence shown.) I don't know that the statute applies in the case of ejectment. Supposing it does, the burden is on the attorney to account for not pleading from Dec., 23rd, 1879, forward to Oct., 1880. It was his duty to plead immediately after the stay of proceedings was removed. He was personally served with the order. His reason is that in consequence of the appeal and papers served on Meagher, Chisholm and Ritchie, he was misled as to the position in which the cause stood. This is contradicted by Mr. Parsons, who shows that no papers were served, as alleged. On the point as to accounting for the time, *Chitty's Arch.*, 986, 987. (McDONALD, C. J.—Can the negligence of the attorney affect

the rights of the client? Would not the client have a right to come in, notwithstanding? The statute does not say that the attorney shall account for the non-appearance, but that the party shall do so, and he has done so to my satisfaction) It must be accounted for by the attorney as well. The statute is in *Chitty*, 988.

There is no allegation that the party has a good defence upon the merits. (McDONALD, C. J.—Do you contend that in addition to disclosing a good defence upon the merits and the grounds of it he must allege that he has a good defence upon the merits?) Yes. (McDONALD, C. J.—Have you any authority?) I have cited one from *Chitty*. (WEATHERBE, J. —I should think it very inconsistent and unnecessary if there is any such legislation or rule in a case where the defence and grounds are disclosed. McDONALD, C. J.—We have no discretion in the matter. Our statute prescribes what is to be done, and we cannot make a rule in opposition to it.) No defence is disclosed. (McDONALD, C. J.—John T. Smith, who is the real defendant, discloses a defence and has a right to come in and test it.) The next point is that the statute does not include actions of ejectment. In respect to ejectment there is a different procedure and a different act. *Revised Statutes*, chapter 94, section 289.

Meagher, Q. C., contra.—The sections in reference to ejectment say nothing about notice of trial, &c., which are governed by the sections in relation to general practice. The *nolle prosequi* which changed the whole complexion of the cause, was smuggled in without notice and after the default was marked. Mr. Smith had a right to treat the default as a perfect nullity. The writ contained counts in trespass and ejectment which cannot be contained in one action. The defence shown by Smith is perfectly good. He got a deed from the executors and did not know of the other deed at the time. In 1858 Ratchford gave a deed to Myers and Starr, as trustees of the Bank of Liverpool. In March, 1859, the statute would begin to run, and Ratchford remained on the land and died there in 1877 or 1878, and his executors then sold to Smith. Under these circumstances, in the face of an adverse possession extending over twenty years, what title had the plaintiffs?

Assuming the deed to be good, the proper and only person to sue is Myers, the co-trustee, who, in the absence of proof to the contrary, must be presumed to be living.

As to the discretion of the Judge, cites cases in *2 R. & G.*, 83, and *11 Ad. & El.*, 333. As to letting in defendant to defend, *4 C. B., N. S.*, 653; *Day's Com. Law Prac.*, 65. The fact of our being in possession coupled with a deed, raises a presumption in our favor. Under chapter *94 R. S.*, section 292, Mr. Smith has a right to come in as landlord. (WEATHERBE, J. —What have you to say about the delay?) I need not go to that, because the default was a nullity, and upon it the plaintiffs could not have taken a step in the cause. The first step would have been to assess damages, and the fact that they could not do it shows that the default was a nullity. Even assuming that the attorney was negligent, Mr. Smith had a right to come in. Up to the time the judgment was entered in September, 1880, all the proceedings are worthless. The plaintiffs do not show any injury through allowing us to come in. As to mistake of solicitors, *L. R., 9 Ch. D.*, 1.

Graham, Q. C., in reply.—The order *nisi* is not taken under the statute. The Judge has no jurisdiction to set aside the judgment on these grounds. (*Meagher, Q. C.*—That is not taken in the grounds of appeal.) The fifth ground will cover it. In *Chitty's Forms*, 488, there is a form of affidavit of merits to set aside a regular judgment. In reference to lapse of time, refers to *Chitty's Arch.*, 987.

The COURT, now, (December 17th, 1881,) pronounced judgment, dismissing the appeal.

WEATHERBE, J., *dubitante.*

McDONALD *v.* VAUX.

Before McDONALD, C. J., McDONALD, JAMES and WEATHERBE, J J.

(Decided December 17th, 1881.)

Appeal from County Court.

WHERE a cause was tried at the County Court Chambers, December 5th, 1879, judgment pronounced December 26th, 1879, and a motion for appeal made on the last day of the January term of the County Court, 1880, which was refused.

Held, that the appellant had not brought himself within the terms of the County Court act of 1877, and that the appeal from the decision of the County Court Judge, refusing the appeal, must be dismissed.

This was an appeal from the judgment of the County Court Judge, at Halifax, refusing an appeal in a cause tried before him.

The writ was issued 22nd February, 1879, and the cause tried at the County Court Chambers, December 5th, 1879. Judgment was given Dec. 26th, 1879, and entered Jan. 13th, 1880. A motion for appeal was made on the last day of the January term of County Court, 1880, and the present appeal is taken from the decision refusing the appeal. The sole question is whether the Judge was not obliged to grant the appeal.

Sedgewick, Q.C., for appellant.—When the County Court act was first passed no provision was made for trial at Chambers, but an appeal was granted in all cases. Chapter 18, *Acts of 1877*, section 53. The act next in order is chapter 6, *Acts of 1877*, sections 1, 2, 25 and 26.

On the last section the Judge refused the appeal. By the first section the Judge is empowered to order causes to be tried out of the regular sittings.

Under section 100 of the *County Court Act of 1880*, where a Judge refuses an order for appeal the party desiring to appeal files a bond within eight days, but he must shew that it was done within eight days.

The decision from which we appeal was given in April.

(WEATHERBE, J.—My opinion is, though it is not a strong one, that you have no remedy against the Judge's refusal to give an appeal. We held that we could give an appeal in the

case of a Judge of the Supreme Court, at Chambers, because the common law right was not taken away. McDONALD, J. —I understand that under the Act of 1874 there is an appeal in all cases, and that unless the section of that act is repealed there must be an appeal. McDONALD, C. J.—Under section 53 the Judge has nothing to do with granting or refusing an appeal. The law gives the appeal, and the only thing for the Judge is to stay proceedings until the judgment is given on appeal, on the giving of a bond. He is to certify the proceedings in the cause, but if he refuses to do so, I should think that would be the subject of an application to this Court to compel him to do his duty.) This Court has decided that until papers are certified there is no appeal. (McDONALD, C, J. —All I can say is that the statute does not say so. My only difficulty is the one thrown out by Mr. Justice WEATHERBE whether the statute is wide enough to give you an appeal from an order refusing an appeal, and that does not seem to be decisive because the consent of the Judge is not necessary.)

Freeman v. *Moran*, 3 R. & C., decided the point that the papers must be certified in order to the appeal. (McDONALD, C. J.—I admit that I am concluded by authority, but I am not convinced.) When we applied for the appeal we applied also for a stay of proceedings. We have shown that our appeal was perfected, but the Judge, notwithstanding, refused to sign the paper by virtue of which execution against us would be stayed. If there is an appeal, the only question is whether the Judge was justified in refusing it.

Fielding, contra.—The Act of 1880 has no application. The Act of 1874, section 51, gives appeals in cases tried in term. At that time there were not trials at sittings. Section 53 directs what the Judge is to do assuming that there is an appeal. His acts, as given in this section, are purely ministerial. The law grants the appeal. There is nothing saying that the Judge shall grant an appeal. This is amended by Act of 1877, cap. 6, sec. 25, under which the Judge may grant or refuse a rule for appeal. The only thing that the Judge could be called upon to do under the Act of 1874, was to certify on filing a bond, which they did not do. (*Sedgewick*, *Q. C.* —It appears from Judge JOHNSTONE'S order for appeal that a bond was filed. McDONALD, C. J.—Please address yourself

to the point whether there is any limitation as to time.) There is nothing in the Act of 1874. But in 1874 there was no provision for Chamber trials. This provision was first made by the Act of 1877. (McDONALD, J.—There were appeals from decisions at Chambers prior to 1877. WEATHERBE, J.—Under the Act of 1877, under which, I think, the Judge was required to act under the authority of *Dewar* v. *Murphy*, 1 R. & G., 84, a time was limited for filing the bond. There is nothing to show that a bond was filed within that time. In *McCabe* v. *McKay*, 3 R. & C.. 83, it was held that the provisions of the Act of 1874 were superseded by the Act of 1877, which, it was said, were infinitely better. McDONALD, C. J.—Then the only question is whether the acts done under section 26 of the Act of 1877, which were all that were necessary to perfect the appeal, were in time. Why was he not in time?) Because he did not apply at the Chambers sittings of the Court. It should have been done on the last day of the sittings. (WEATHERBE, J.—There is nothing to show when it was done. McDONALD, C. J.—Judge JOHNSTONE refused the appeal because he thought the time had passed and he could not grant it. I think we should decide this case on the point whether he was right or not.)

McDONALD, C. J., now, (December 17th, 1881,) delivered the judgment of the Court, dismissing the appeal on the ground that the appellant had failed to bring himself within the statute of 1877.

BROOKFIELD *v.* SYMES.

Before McDONALD, C. J., and McDONALD, SMITH, JAMES and WEATHERBE, J J.

(Decided December 17th, 1881.)

Relief of Insolvent Debtors. *—Appeal from Commissioners.*

DEFENDANT was imprisoned in the County jail under process issued out of the County Court and detained under an order of commissioners for the relief of Insolvent Debtors. An application was made to this Court *in banc* for a summons to have the prisoner brought up by way of appeal.

***Held*, that the Court had no jurisdiction to hear the case, not having met within ten days from the date of the order from which the appeal was sought.**

Motton applied for a summons to have Symes, who had been confined in jail under process out of the County Court

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at Halifax, and was detained under an order of commissioners for relief of insolvent debtors, brought before the Court as in ordinary cases of appeal, citing *Revised Statutes*, chapter 137, section 5, and *Acts of 1880*, chapter 2, sections 108, 109. Assuming that jurisdiction is given to the County Court under the latter act, it was not taken away from the Supreme Court, or a judge. The object of the act is, that where a party is imprisoned outside of Halifax under process issued out of the County Court the appeal may be to the Supreme Court. (WEATHERBE, J.—Your application is under section 111 of chapter 2 of the Act of 1880?) Yes. (WEATHERBE, J. —Should you not go to a single Judge?) The Judge refused to act. (WEATHERBE, J.—You would certainly have an an appeal from the refusal of a Judge to act.) The statute of 1880 preserves intact the distinction between process issued out of the Supreme and County Courts. In cases issued out of the Supreme Court the appeal is to the Supreme Court, and in cases issuing out of the County and Justices' Courts the appeal is to the County Court, and if no County Court is sitting, to the Supreme Court. (MCDONALD, C. J.—The appeal from commissioners is to the County Court. Does not that include cases which come before commissioners, whether the process is issued out of the Supreme or County Courts?) I don't think the context bears out such a reading.

McCoy, Q. C., wished to read an affidavit shewing dates of the sitting of the County Court, but was not allowed by the Court.

MCDONALD, C. J.—The Court is of opinion that it has no jurisdiction, inasmuch as it did not meet ten days after the making of the order which is the subject of appeal.

GREENFIELD *v.* YORKE.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided December 21st, 1881.)

Insolvent Act of 1875.—Liability of attaching creditor for costs of official assignee.

THE defendant placed a writ of attachment in the hands of the plaintiff as official assignee under the Insolvent Act of 1875, and after the creditors' meeting gave defendant notice of taxation. Defendant attended the taxation, and, at his instance, some of the items were struck off. The balance of the amount, as taxed by the Judge for the costs of the official assignee down to the appointment of the creditor's assignee, defendant promised to pay. An action was brought by the plaintiff for the amount, and judgment was given for the plaintiff by the County Court Judge, which, on appeal, was reversed, judgment below being entered for defendant.

This was an action brought by plaintiff, Official Assignee of the County of Cumberland, against the defendant, attaching creditor of Slayter & Stewart, insolvents, to recover the plaintiff's fees for the preliminary proceedings under which the firm of Slayter & Stewart were placed in bankruptcy. The cause was tried before the County Court Judge for district No. 5, who gave judgment for plaintiff, from which defendant appealed.

The following is the judgment of MORSE, J., from which the appeal is taken:

This is an action brought by Greenfield, one of the late assignees for Cumberland, appointed under the Insolvent Act of 1875, to recover from the defendant, Yorke, the attaching creditor of the insolvents Slayter & Stewart, at Parrsboro', the sum of $70.40, amount of costs taxed by me, in July, 1880, pursuant to notice of taxation of the date 10th July, 1880, service of which notice was accepted by defendant. The taxation took place between the 10th and 20th July, now last past, under and by virtue of this notice. Defendant and plaintiff, in company with C. R. Smith, Esq., appeared before me at my Chambers, in Amherst, and the bill was taxed by me. On opposition of defendant, items were struck out of it, and the bill, largely reduced, was taxed at the sum of $70.40, and defendant thereupon promised to pay it, as is clear from the evidence of plaintiff and Smith. The action to recover this taxed bill was brought on the 11th September, 1880.

Defendant sets up as an answer: 1st. The plea of never indebted; then three added pleas. The first of the added pleas states that plaintiff, as official assignee, became creditors' assignee by default of appointment on the part of creditors, and, as such, took no steps to realize the assets of the insolvent's estate, and refused to do so. The second added plea is a plea on equitable grounds, substantially the same as the first. The third added plea is to jurisdiction. With respect to the first two added pleas, the minutes of the first meeting of creditors show to my mind that these pleas cannot be sustained. The minutes show that plaintiff did not become creditors' assignee by default of appointment or by choice of creditors; but on the contrary, Dr. Clarke became and was selected creditors' assignee. Reference to the adjourned meeting of the 30th April, 1880, shews that A. W. Gow, a person representing a creditor with a claim duly filed to the amount of $234.22, moved that Dr. Clarke be requested to act as creditors' assignee of the estate, and that this motion was seconded by one Vickery, with a claim also duly filed amounting to $121.89, Subsequently Vickery reported to the meeting of creditors that Dr. Clarke had accepted the position of assignee, and the creditors, thereupon, on motion, fixed the amount of security that Dr. Clarke should give. The creditors had previously, at this meeting, appointed inspectors. This appears to me to be a sufficient appointment under the law. No dissenting voice was raised at this first meeting against Clarke being assignee. I gather from these minutes that the creditors unanimously have and did express a preference for Dr. Clarke. *Bump on Bankruptcy*, page 477, lays it down on the authority *In Re Pearson*, 2 B. R., 477, that there is no such thing known to the law as an informal vote. An expression *viva voce* by the creditors of their preference is a vote; *vide Clarke's Insolvent Act of 1875*, page 140. This, to my mind, disposes of the two pleas that plaintiff became assignee of Slayter & Stewart's estate by default of appointment, and, if no longer assignee, he could not intermeddle with the estate or sell or dispose of the same. He merely became its custodian until Clarke should qualify himself.

Yorke, the defendant, in his evidence, says; "Dr. Clarke did not act as assignee, he delined to act." The course which

I think, under the circumstances, ought to have been adopted then, was to have had another meeting called, as by law required, and procured the removal of Dr. Clarke, on the ground that he would not act and had not qualified himself. No movement of this kind appears to have been made by the creditors or the inspectors of the estate, nor was any application ever made to me as Judge. In such a state of things, either Clarke should have qualified himself by giving the security, or a new assignee should have been appointed. In *Wotherspoon's Insolvent Act, 1875*, page 79, it is laid down on the authority of *Ex parte Pearson*, that a new choice will be directed where the assignee has been chosen without his consent or knowledge and declines to act. In *Bump on Bankruptcy*, page 485, *In Re George E. Sands*, it is laid down; "The removal of an assignee from office is necessary before another assignee can be appointed in his place. There is no pretension of any meeting of creditors in the estate after the first meeting, except the one mentioned in defendant's letter to plaintiff of the 21st September, 1880, which is ten days after the action brought in this cause, which was an informal meeting not regularly called, and the object of which was to direct Greenfield to sell the estate. It was in all respects an illegal meeting, for the letter shews that Ryfkogle, who is proved by the minutes of the first meeting to be the largest creditor, and whose claim was duly filed, was purposely not invited to attend a meeting called to dispose of the estate, of which he was the largest creditor. This meeting was held in defendant's office. Why was Ryfkogle purposely excluded? Was it because the attached property was his, and if he had attended, the creditors would not have ordered the sale? Or, was it an attempt to get rid of paying Greenfield his bill? The creditors themselves seem to have set but little value on the assets of this estate, if any there were, for from the first meeting of creditors, on the 25th March, 1880, until the illegal meeting mentioned in defendant's letter of the 21st September, 1880, they neither moved in the matter nor paid the least attention to it. In the month of July, 1880, pursuant to the notice of taxation, I taxed the bill sued on in this cause, and from which no appeal was ever taken, as provided by section 128, Insolvent Act of 1875, and I question my

power now to alter, depart from, or reduce the bill so taxed. If I should attempt to do so, I would be doing what I submit an inferior Court, or a Judge thereof, would not be justified in doing. I would be improperly assuming the functions of revision which belong alone under the Insolvent act, in cases like this, to the Judges of the Supreme Court; for if I was wrong in taxing these costs against defendants, as I did in July, the matter should have been taken to the Supreme Court, by way of appeal, to be remedied. That the official assignee could fairly ask and demand something from the defendant is, I think, clear.

The defendant in this case put him in motion under the Writ of Attachment. *Bump on Bankruptcy*, page 674, lays it down on the authorities, *In Re Hughes*, 1, B. R. 226, S. C., 2, Ben. 85, S. C., 1 L. T. 45; "that the funds necessary for the performance of a duty are to be advanced by the party for whom the services are to be performed." In this case, in the first instance, the services were to be performed for the defendant Yorke, the attaching creditor, and his subsequent promise to pay the bill will, I think, bind him, especially after recognizing the plaintiff's claim by appearing before me and contesting the taxation, and afterwards promising to pay the amount of the bill in a fortnight. Section 28, sub-section *b*, makes the official assignee an officer of the Court having jurisdiction in the county or district for which he is appointed. He is accountable for money, &c., in the same manner as sheriffs and other officers are. I cannot bring my mind to the view that the act burdens him with all the responsibilities of a sheriff, and excludes him from the right of looking for payment of fees for travel and service, &c., to the person who employed him. Under the Insolvent Act of 1869, the Judges of the Supreme Court of Nova Scotia, by order of the 13th of Sept., 1869, *vide Clarke's Insolvent Act of 1869*, page 422, ordered as follows: "It is ordered by virtue of the 32 and 33 Vict., chap. 16, intituled: 'An act respecting insolvency sect. 139,' that until further direction therein the same costs, fees, and charges shall or may be taken or paid by and to the Judges of Probate, counsel, attorney, solicitors, and sheriff as are now payable to and taken by them in the Supreme Court or Court of Probate, in this Province, under and by virtue of the act

in that behalf." By section 123, of the Insolvent Act of 1875, it was provided, among other things, that the Judges of the Supreme Court of Nova Scotia, being the Court of Appeal under said Act, shall make, frame, and settle the forms, rules, and regulations to be followed and observed in proceedings in insolvency under this Act; and fix and settle the costs, fees, and charges which shall or may be taken or paid, in all such cases, by or to attorneys, &c., and by or to sheriffs, assignees, &c. No application was ever made, so far as I am aware, by the Judges of the County Court to the Judges of the Supreme Court, to have the provisions of this section, so far as the Province of Nova Scotia is concerned, carried into effect, and in default, section 124 provided that until such rules of practice and tariff of fees have been made, as required by sections 122 and 125, such rules of practice and tariff of fees of insolvency, now in force in the said Province respectively, shall continue and remain in full force and effect. The practice in the Court of Probate always was and is to prepay fees for services to be performed. I now ask myself would the Judges of the Supreme Court, or the Judges of the Courts of Probate, 'under and by virtue of the acts in that behalf," to use the language of the order of the Supreme Court of 1869, in a case similar to the present, have taxed or allowed anything to the sheriff or the assignee as against the party who put either of them in motion and promised to pay them. I think they would have allowed the fees for travel and service, &c. It is possible that in allowing plaintiff remuneration beyond and exclusive of the actual expense of going to seize property and service of writ, I may have erred, although I do not think it excessive as it was fully discussed by plaintiff and defendant at the time of taxation. But as the objection was not raised at this time, and I have so taxed the bill, and no appeal was ever taken by defendant, as provided by the Insolvent Act, I feel myself now restrained from going outside or beyond the bill, for to do so would be to assume the right of revision. In my judgment the bill is conclusive between the parties, and therefore binding on me, and I give judgment to plaintiff for $70.40, the amount of the taxed bill.

Townshend, Q. C., (with whom was the *Attorney-General,*) in support of appeal.—The Judge bases his decision on a very

palpable fallacy, the promise to pay, which, if there was no antecedent liability, amounts to nothing. The section of the act in reference to costs is 118. This settles the question as to where the payment is to come from. The costs, up to the time of the appointment of the assignee, are made a first charge upon the estate.

Pipes, contra.—Our first contention is that the official assignee is an official of the Court the same as a sheriff. *Clarke's Insol. Act*, chapter 133, section 28, sub-section 8, also p. 296, where a decision of Supreme Court of Ontario is given to that effect. He is in the same position in reference to his fees as the sheriff. (WEATHERBE, J.—He is the same in certain specified cases.) He has the same right of action against the party putting him in motion for moneys paid or services rendered. In *Bliss* v. *Dickey*, 1 R. & G., 246, it was held that the Registrar of Probate could sue for fees. (SMITH, J.—The difference here is that the official assignee puts the estate in insolvency for the benefit of the creditors generally. WEATHERBE, J.—The statute makes the party expressly liable for fees to the registrar.) It only fixes the amount of the fees; it does not say in so many words who is to pay them. The question is purely one of contract,—what services were rendered, and at whose instance. Suppose the writ were improperly issued, in that case the assignee would lose his lien and would have no remedy, unless the party putting him in motion was liable. As to the right of the sheriff to sue, *4 M. & S.*, 256. (SMITH, J.—To what extent do you say the creditor makes himself personally liable?) Up to the time of the appointment of the creditors' assignee. The costs were taxed under section 43 of the act. The taxation merely fixes the amount. (WEATHERBE, J.—The statute does not contemplate a case of this sort at all.) Section 30 shows that the officicial assignee was bound at once to transfer the estate, and could not retain it on account of his lien. *L. R.*, 1 Exch., 1. (WEATHERBE, J.—After the attaching creditor takes the first step, has he any more right than any other creditor? Has he any control over the proceedings?) I don't know that he has. He sets the proceedings in motion, that is all.

Townshend, Q. C., in reply.—Where the proceedings are set aside the attaching creditor is not liable. *3 Camp.*, 374. The sheriff has no claim to remuneration at law, independently of statute. *2 T. R.*, 158; *10 Mod.*, 139; *2 B. & Ald.*, 566. If the assignee is in the position of the sheriff, these cases are a complete answer.

SMITH, J.—It is unnecessary to go any further. The appeal must be allowed.

WEATHERBE, J.—Mr. Pipes has made the best argument he could, but I thought from the first that there was no doubt about the question.

Appeal allowed. Judgment below to be entered for the defendant.

BOSSOM *v.* COOMBES.

Before McDONALD, C. J., and SMITH, JAMES and WEATHERBE, J J.

(Decided December 23rd, 1881)

Motion to strike off cause.—Papers not on file.—Appeal in causes originating in Magistrates' Court.--Amount in dispute under $40.00.

A rule *nisi* was taken April 2nd, 1881, to strike a cause off the docket on the grounds that the papers were not on file, and that the cause had originated in the County Court and the amount in dispute was less than $40.00, being only $10.50. It was shown by affidavit on the argument of the rule that the reason why the papers were not on file was that an application was pending in the Court below to amend the minutes. The rule *nisi* was, after argument discharged. Another rule *nisi* was taken out (December 14th, 1881,) to strike off the cause and dismiss the appeal on the same grounds as before. The papers were not on file at the time of taking out the rule *nisi*, but were filed before the argument.

Held, that this was not sufficient, and that the appeal must be dismissed.

McCoy, Q. C., moved, April 2nd, 1881, before RITCHIE, E. J., SMITH, JAMES and WEATHERBE. J J., to strike the cause off the docket, on the grounds that the papers were not filed, and also that the cause was originally tried in the City Court and appealed to the County Court, and that the judgment of the City Court having been there reversed, and the amount in dispute being under $40, no further appeal would lie.

Bligh, contra, cites section 107 of chapter 2 of the *Acts of 1880*. The County Court Judge may grant appeals in cases

under $40. The Judge has stated a case under this section. I have a right to appeal at any time before judgment is entered up. *14 U. C., C. P.*, 142. At any rate the Judge below should have a discretion as to this. (RITCHIE, E. J.—You had better meet the point as to the non-filing of the papers.) There is no doubt that the rule stating the case is on file in this Court.

McCoy, Q. C.—By section 104 it is the duty of the appellant to place the papers on file with the clerk below, who must immediately send them to the Supreme Court.

Bligh.—That clause refers entirely to the duty of the clerk. *3 H. & N.*, 54; *23 U. C., Q. B.*, 310. To explain non-filing of papers, reads affidavit, showing that an application is pending before the Judge below to have the minutes amended. (RITCHIE, E. J.—If that had been stated before, no rule *nisi* would have been granted. SMITH, J.—I think you were premature in placing the cause on the docket.)

McCoy, Q. C.—The appeal must be entered after it is perfected, and must be perfected within eight days. Section 100. The appeal, when perfected, operates as a stay of proceedings. Section 106, providing for appeals, applies only to causes over $40. *Rex* v. *Hansen*, 4 B. & A., 521; *8 A. & E.*, 405. A right of appeal cannot be implied. *10 H. L.*, 1016, lays down the same doctrine.

The COURT reserved judgment, and afterwards refused the application.

LeNoir, afterwards, (December 14th, 1881,) obtained a rule *nisi* to strike the cause off the docket and dismiss the appeal, which he now, (December 23rd, 1881,) moved to make absolute, contending that the appeal must be dismissed, as the sum involved was only $10.50; that the cause was tried originally in the City Court and appealed to the County Court, and could not be brought up under sections 106 and 107 of the County Court Act, by way of appeal, where the sum in dispute was under $40. He also contended that the papers had not been sent up in time.

Eaton, contra.—This application was heard before and dismissed. (The COURT.—It was dismissed because it was

made too soon.) The papers have been brought up here since the motion for the rule *nisi*.

The COURT.—That is not sufficient. The rule must be made absolute with costs.

GISBORNE *v.* CAPE BRETON CO., (LIMITED.)

Before SIR WM. YOUNG, C., J., and DESBARRES, SMITH and JAMES, J J.

(Decided December 23rd, 1881.)

Rule referring to Court Evidence to be taken before Master.—Jurisdiction to hear cause.

A CAUSE was tried at Sydney and not concluded when the Court adjourned. A rule was then made, consented to by the counsel and attorneys of both parties, ordering that, in addition to the evidence taken before the Court, further evidence should be taken at Sydney before a Judge or a person named in the rule, and at Halifax before a Master, in the manner set out in the rule, that all the evidence should be filed with the Prothonotary at Halifax, and the cause should be heard upon such evidence before the Court sitting *in banc* at Halifax, and that the Court should have power to refer any matter of account in said cause to a Master or referee for his report, which report the Court might confirm, reject, or utilise, as it should see fit, and enter up judgment for either of the parties, and it was further ordered that the Court should have power to make all and any orders, and do all things necessary for the purpose of finally disposing of the cause.

Held, that the Court had no jurisdiction to hear the cause under the rule.

This cause came before the Court under the following rule, consented to by the parties and their attorneys and counsel:

CAPE BRETON, SS.

IN THE SUPREME COURT.

October Term, 1877.

Cause — FREDERICK N. GISBORNE, *Plaintiff*,

vs.

CAPE BRETON COMPANY (LIMITED,) *Defendants.*

It is hereby ordered by the agreement and consent of the parties to this cause, their counsel and attornies that, in addition to the evidence taken in this cause before the Court at this term thereof, further evidence shall be taken therein on the part of both or either of the parties, as follows, that is to

say; such further evidence to be taken at Sydney, in this county, on the thirteenth day of October instant, before a Judge of this Honorable Court, or before John Fergusson, Esquire, or both of them, the same to be continued to be taken, if necessary, till the evening of the seventeenth day of said month, and at the city of Halifax, on the twenty-fifth day of said month, before William Twining, Esquire, or any other Master of the said Court agreed upon by the parties or their counsel or named by a Judge of said Court, such evidence at Halifax to continue to be taken on every successive day till finished. And it is further ordered by like agreement and consent, that all the said evidence so already taken and to be taken under this rule shall, immediately after the same is taken, be filed with the prothonotary of the said Court, at Halifax, and that this cause shall be heard upon such evidence before the said Court sitting *in banc*, at Halifax, at the next ensuing term thereof, and that said Court shall have power to refer any matter of account in said cause to a master or masters, or to referees, for their report, which report the Court may confirm, reject, refer or utilize, as they may see fit, and also to enter up judgment for either of the said parties for any sum with costs.

And whereas, the said cause has been so referred to the said Court for the purpose of finally disposing of the same, it is therefore further ordered, as aforesaid, that the said Court shall have power to make all and any orders, and do all things which may be necessary for that purpose and which they may deem advisable therefor.

Dated at Sydney, October 12th, A. D. 1877.

By the Court.

C. E. LEONARD, *Proth'y.*

Graham, Q.C., for defendant, contended that the Court could only sit under this rule as arbitrators. If the Court could not sit as arbitrators the cause would have to be thrown out. The power to refer matters to masters ceased when the Court ceased to be a Court of Common Law and Equity combined. He protested against the cause being referred to a master. He had either a right to have the cause tried by a jury or by this Court under the consent rule.

Rigby, Q. C., contra.—The objection of the counsel is extraordinary. All the counsel have signed the rule, the evidence was taken, and partly paid for by the learned counsel himself. I ask that the Court consider the propriety under the rule of sending the matters of account to a referee to report the amount due by either party to the other, reserving and reporting to this Court any questions of law.

Attorney-General.—This case came before Mr. Justice JAMES for trial. The term having expired, further evidence was taken, and the whole matter now comes before your lordships. The intention of this consent rule was that this Court should hear the evidence, determine matters of law, and send matters of account, if any, to a master. We contend that there are no matters of account, but the liability depends on legal questions entirely.

The COURT, (December 23rd, 1881,) decided that they had no jurisdiction under the rule.

McDONALD *v.* McDONALD.

Before McDONALD, C. J., and McDONALD, SMITH, JAMES and RIGBY, J J.

(Decided January 7th, 1882.)

Order made by Judge returnable before presiding Judge on circuit, rescinded.

A RULE to set aside pleas was made by a Judge returnable before "the presiding Judge of this Honorable Court at Guysborough, on the first day of the ensuing October term there," and was argued on the first day of the term after the opening of the Court. Judgment was reserved and afterwards at Halifax the learned Judge who heard the argument made an order absolute setting aside one of the pleas, and then resigned.

Held, that the order must be rescinded on the ground that it was made returnable in Court.

This was a motion to make absolute a rule to rescind an order of Ex-Justice DESBARRES, made at Halifax. The action was for penalties for the suppression of a will. Several pleas were pleaded, one denying the making of the will. The plaintiff applied for a rule to set aside these pleas, and an order was granted, returnable at Guysboro', in the following form: "On hearing read the declaration and pleas herein,

&c., and on motion I do order that the pleas pleaded herein by the defendant be set aside as false, frivolous and vexatious, with costs, unless cause to the contrary be shown before the Judge of this Honorable Court, who shall preside at Guysboro', on the first day of the ensuing October term there. I do further order," &c. Cause was shown there but no judgment was delivered, and, subsequently, at Halifax, just previous to his lordship's retirement, the rule was discharged, except as to one plea. There was no adjournment.

Attorney-General, for rule.—The same question came up in *Re Cameron's Circus*, 2 R. & G., 248, 252. A plea should never be set aside where it rests on facts in the knowledge of the plaintiff, as it deprives us of the right of cross-examination. *1 N. S. Decisions*, 521.

The second ground is that the rule was made absolute with costs, though the defendant had substantially succeeded. (JAMES, J.—Is it not a matter of discretion?) Not an absolute discretion. It is reviewable. The order was irregular. It could only be made absolute by the Court, at Guysboro'. A Judge sitting here at Chambers has no control over the matter. His Lordship had no power to make a rule *nisi* returnable at or before the Court, at Guysboro'. *Acts of 1880*, chap. 13, sec. 26. His power is only to make rules returnable before the Court *in banco*.

Eaton, contra.—The rule was not made returnable before the Court, but before the presiding Judge, who could hear it at Guysboro' or anywhere else. (McDONALD, C. J.—Suppose we admit the proceedings to the date of the order were irregular. The defendant was entitled to an appeal which he was prevented from obtaining by the resignation of the Judge. Is he not justified, then, in coming here, as he has done, on the merits?) The merits are with us.

Henry, Q. C.—A Judge on circuit, sitting as the Court, can still execute some of the functions of a Judge. If this rule was returnable before the Court, we must submit. (RIGBY, J. —Was it not argued before the Court?) It seems to me that that is equivocal. The order is drawn in equivocal terms. A Judge sitting as our Judges do on circuit does not lose the powers that he otherwise possesses as a single Judge. He

might sign an order, for instance, in cases where he would have power as a single Judge to do so. It is immaterial that an argument took place before him and that the Court was sitting at the time? The fact that no order could be made returnable before the Court should throw some light on the reading of the rule. It was for this reason that the rule was made before the presiding Judge. The mention of time and place is a mere matter of convenience. The rule must be read as if it were worded, "before the Judge who shall preside at Guysboro'." If there is anything outstanding to be tried under the plea, the rule may have to be rescinded.

McDONALD, C. J.—We are all of opinion that the order of Mr. Justice DESBARRES must be rescinded on the ground that it was made returnable in Court. For myself I think it was not sufficiently shown that the plea was false, frivolous and vexatious, yet the defendant is deprived of the benefit of it.

The rule will be made absolute with costs, the costs below to abide the event.

JOHNSTON *v.* McLEAN.

Before McDONALD, C. J., and JAMES, WEATHERBE and RIGBY, J J.

(Decided January 10th, 1882.)

Entry of Appeal.

APPELLANT allowed to enter cause, on payment of costs of rule to dismiss appeal for non-entry, where the failure to enter it resulted from misunderstanding between counsel engaged.

Meagher, Q. C., moved to make absolute the rule to dismiss the appeal, on the ground of the non-entry of the appeal.

Weeks, Q. C., contra, read affidavits of himself and James F. Hearn, showing a misunderstanding as to who was to enter the appeal, each one supposing that the other was to enter the cause. He moved to enter the cause.

McDONALD, C. J.—We think Mr. Weeks should have an opportunity of entering the cause. Mr. Meagher's motion will drop and Mr. Weeks will take his rule to enter the cause, on payment of costs.

ANNAND *v.* BRENNAN.

Before McDONALD, C. J., and JAMES, WEATHERBE and RIGBY, J J.

(Decided January 12th, 1883.)

Contract to advertise for a year.—Advertisement discontinued.—Rescission.

PLAINTIFF declared on a contract to publish an advertisement for defendant for a year, to occupy a stipulated space, for $200 per annum, defendant to have the privilege of changing the advertisement. Previous to the expiration of the year defendant ordered the advertisement to be discontinued. No further advertisement was published for defendant and the space was filled with other matter.

Held, that plaintiff was entitled to recover for the whole year including the period during which no advertisement was published.

The plaintiff, in his writ, set out that, on or about the sixteenth day of May, A. D. 1879, it was agreed by and between the plaintiff and defendant that in consideration that the plaintiff would print and publish the advertisements of the defendant, when requested, in certain newspapers called "Morning Chronicle" and "Evening Citizen and Chronicle," two squares deep, double column, for the space of one year, and a local of twelve lines in said papers for six months, the said defendant would pay the plaintiff the sum of two hundred dollars by quarterly instalments of fifty dollars each, on the sixteenth days of August, November, February and May then next following, and the plaintiff printed and published, when requested, the said advertisements during the space of one year, and the said local notices for the space of six months, and performed all things on his part to be performed, and all things happened, and all things on the plaintiff's part were done to entitle him to receive the said money in instalments, as aforesaid, but the defendant did not pay the sum of fifty dollars due on the sixteenth day of May last past, in respect of his agreement, and the same is due and owing to the plaintiff: The writ also contained the common counts.

At the trial, before JOHNSTONE, J., of the County Court, at Halifax, the contract was thus sworn to by Dunn, an employe of plaintiff; "Defendant made an arrangement in May, 1879, for a year, to insert his advertisements for a year in the "Morning Chronicle" and "Evening Citizen and Chronicle," two squares deep, double column, of business advertisements, for $200, payable quarterly, defendant to have the

privilege of changing advertisements. We would retain one advertisement until the other was sent, unless ordered out; a local was to appear for the first six months of the year. He paid three quarters. We published his advertisement under the agreement. First advertisement was in evening paper May 15th, "Morning Chronicle," May 16th. Advertisement appeared for the year, lacking six weeks, when we received the following letter from defendant:

"HALIFAX, *April 1st, 1880.*"

"C. ANNAND, ESQ.

"*Dear Sir*,—You will discontinue my advertisement in morning and evening papers from this date."

"Yours truly,

"W. C. BRENNAN."

We never refused to insert any advertisements sent there. Never any complaint of contract not being carried out. No agreement as to retaining space. No advertisement sent, after receipt of letter, under this arrangement.

Cross-examined.—Nothing said about retaining space. We place the advertisements as agreed on. We never make a contract to keep a space. A certain particular space was assigned him,—the top of the column, "Citizen," and in the "Morning Chronicle" next below Clayton & Sons. Never save a totally blank space.

The evidence thus given was substantially corroborated by the other witnesses for plaintiff.

JOHNSTONE, J., delivered the following judgment:

I am of the same opinion that I was at the trial, that the plaintiff was under no obligation to retain a space vacant for defendant, but that he fulfilled his contract if he was ready to insert the advertisement whenever ordered. If the blank space was required as an advertisement, then the defendant should have so ordered when he ordered out the printed advertisement. I think the first count is sufficiently well stated, and, if not, that the indebitatus work and labour count would suffice, the consideration being executed.

Judgment for plaintiff, $50.

Longley, in support of appeal.—The contract not having been actually performed, and having been mutually rescinded, the plaintiff cannot recover on his special contract. Being forced back upon the common counts, he can only recover for the work actually done. He is only therefore entitled to $25. The evidence is that when Brennan's advertisement was ordered out the space was filled with other matter, which was paid for. (WEATHERBE, J.—You should set out the grounds you are moving on and keep within them.) Our first ground is that the contract sued on is different from that in the evidence. (WEATHERBE. J.—You should set out the terms of the variance. RIGBY, J.—Do you contend that Mr. Annand was bound to go on publishing the advertisement after Brennan ordered it out?) I do. (JAMES, J.—I think you are entitled to credit for the proceeds of advertisements occupying the space to which you were entitled. (MCDONALD, C. J.—The plaintiff was bound to insert an advertisement occupying a certain space for a certain time, provided you offered the advertisement to enable him to do so. If you did not do so, I do not see how you can say he broke his contract.) Performance is averred and non-performance proved, and no excuse shown. *Stephen on Pleading*, 329; *1 Williams' Saunders*, 235. The contract was executory, and plaintiff must show the performance of all conditions precedent. (WEATHERBE, J.—You surely have not taken that point.) Yes, we have. There was a mutual rescission of the contract, and, if so, it was fatal.

McSweeny & Fielding, for respondent, not called upon.

MCDONALD, C. J.—We are all of opinion that the contract was fulfilled by the plaintiff, and that he is entitled to recover. The contract was to do certain work when requested so to do, and the evidence is, that until ordered by you not to do the work, the plaintiff was ready and willing to do it. The appeal is dismissed.

BLACK ET AL. *v.* BARSS.

Before McDONALD, SMITH and WEATHERBE, J J.

(Decided January 11th, 1882.)

Non-joinder.—Suit by two out of three obligees.—No allegation of the death of the third.

A BOND was made to three obligees, one of whom had died before the action, which was brought by the surviving obligees and the executrix of the deceased obligee. At the trial plaintiffs' counsel obtained leave to strike out the name of the executrix. There was no allegation in the writ of the death of one of the obligees but evidence of the fact was given at the trial.

Held, That the omission in the writ was fatal, and that the verdict by consent for plaintiffs must be set aside.

Plaintiffs gave a bond to the Bank of Nova Scotia to secure a loan of $80,000, made to the Bank of Liverpool, of which plaintiffs were shareholders. Plaintiffs then took bonds from other shareholders of the Bank of Liverpool for the re-payment of a proportionate amount of any sum paid by them on their bond to the Bank of Nova Scotia. The present action is brought by the plaintiffs against defendant to recover his proportion of an amount so paid by plaintiffs to the Bank of Nova Scotia.

The bond sued on was made to C. H. M. Black, W. L. Black and M. P. Black, but, W. L. Black having died before action, the suit was brought in the name of C. H. M. Black, M. P. Black, and Mary Black, executrix of the deceased W. L. Black. At the trial plaintiffs' counsel asked for and obtained permission to strike out the name of Mary Black as plaintiff. It was in evidence that William L. Black was dead at the time the writ was issued, but there was no allegation of that fact in the writ. A verdict was taken for plaintiffs by consent subject to the opinion of the Court, and a rule *nisi* was accordingly taken to set the verdict aside. The argument turned largely on a question as to the appropriation of certain securities to the payment of the loan, but as the decision of the Court proceeds mainly on a question of pleading, it is not deemed necesary to set out the evidence which consisted largely of a series of complicated financial statements.

King.—There was no contract. The parties who have sued cannot recover. The bond was a joint one, payable to

three parties. The action is brought by two parties, and there is no allegation of the death of the third. Two of three obligees cannot recover. There being no allegation in the writ of the death of W. L. Black, any evidence of it received must be struck out. *Addison on Contracts*, 343, citing *1 B. & S.*, 332; *1 East.*, 497; *14 M. & W.*, 571. It is admitted that C. H. M. Black paid nothing on account of the bond. Only one of the parties sueing paid anything. (WEATHERBE, J.—I don't think it is for you to raise that question.) Evidence was wrongly received. There was no evidence that Mr. Leslie had authority to sign the certificate put in to show that the Bank of Liverpool acknowledged an indebtedness on the loan account. That is the only evidence to show that anything was due from the Bank of Liverpool. If it was an ordinary money bond it would be sufficient to show that money was paid under it. But here it is necessary to show an indebtedness or an obligation on plaintiffs' part to pay the money; Robie L. Sterns had no authority to sign an acknowledgement for the Bank of Liverpool. There is no evidence that the manager had any authority to sign such an acknowledgment. Mr. Leslie was at one time manager, and was also at the same time agent for the Bank of Nova Scotia. Neither of these could, in any case, bind the surety.

Our contention is that this loan was paid. The Bank of Nova Scotia first appropriated a certain amount from the Bank of Liverpool to this account and afterwards, without consent of the Bank of Liverpool, divided it among a number of accounts. The money was not appropriated by the Bank of Liverpool, but the Bank of Nova Scotia was obliged to appropriate it to this account because it was a secured account. (*Atty.-General.*—It is clear that if the whole of the $16,445.10 is to be appropriated to this loan, the whole account would be paid.) That is really the main question, whether this $16,445.10 should be so appropriated. Apart from appropriation, there was enough money sent that was unappropriated to fully pay this account, and the Bank of Nova Scotia should have appropriated it to this claim, as it was a secured claim, and, also, on the ground that this was an older debt. It is admitted that there is enough included in the indenture of October 11th to pay the claim of the Bank of Nova Scotia,

if appropriated to that claim. *Kinneard* v. *Webster*, L. R., 10 Ch. D., 139; *Hooper* v. *Kay*, L. R. 1 Q. B. D., 178; *1 Merivale*, 572; *Tudor's* L. C., p. 1; *R. S.*, cap. 94, sec. 370; *Story's Eq. Jur.*, sec. 459, note *b*. It was actually appropriated to the payment of this debt, and the appropriation changed without the consent of the Bank of Liverpool.

Attorney-General, contra.—The question as to the $16,500 has been argued as if it were a question of the appropriation of payments. It was not payments at all, but securities only, as to the appropriation of which the law is silent. Before they matured, or anything was paid on them, they were appropriated otherwise by the parties. The appropriation in the letter of July 13th was an appropriation only to an over-due payment, which had been all paid before the maturity of the acceptances the appropriation of which they now claim to this account. They now claim it for the last instalment due January, 1875. (WEATHERBE, J.—Is there not an appropriation in letter of January 1st, 1875, where he says, "you hold guaranteed compromise drafts and notes, &c., $16,500?) That letter was written before the last instalment was due,—eight days before. Even assuming it to have been written in anticipation, there was no appropriation in that letter. The Bank of Nova Scotia did not, as a matter of fact, hold that paper against the last instalment. The letter does not purport to be appropriating these acceptances, but to state a fact as to them. $13,000 of the $33,000 was on a balance from the previous instalment, to which the $16,500 was no doubt appropriated. $5000 of that was paid by Black, $2.082 55, $879.34, and $5,748.86 being the full amount of the balance of the previous instalment. After the letter was written, facts transpired which made it necessary for them to be withdrawn from the appropriation to this amount, as the instalment to which they were appropriated was paid, except $5,748, which was paid on that account out of these acceptances, and which was all that had at the time matured.

The appropriation of securities does not come within the principle contended for. It is a matter of special agreement. We did appropriate to this account $5748.86. The amount they say we have diverted is $10,963.40. Up to the time

when, as they say, this was diverted, they were merely collateral securities and not payments at all. They were not yet due, and were not paid until due. They could be assigned and re-assigned without the principle of appropriation intervening at all.

The indenture of October 11th, 1875, abrogates any previous appropriation. It assigned them generally for all indebtedness, and the Bank of Nova Scotia would have a right to appropriate them. If it did not appropriate the payments they would go to the oldest debt, which was the general account. Our contention is that they were appropriated by the Bank of Nova Scotia, assented to by the Bank of Liverpool, to the general account.

The misappropriation of securities should have been pleaded, and should have been pleaded in Equity.

The burden is upon the defendant of showing that the secured account is the oldest. The evidence shows that it is not.

The certificates from Leslie and Sterns were admissible as adjustments of account between the debtor and the creditor. The admission of the debtor in the course of his duty in regard to the loan binds the surety. Of course no admission after the transactions were all closed would bind the surety. Leslie's authority is sufficiently proved. As to Sterns, the paper was sent by the Bank of Nova Scotia to the Bank of Liverpool, and came back thus signed, and the defendants have put in a number of exhibits signed in the same way.

It is only necessary for us to prove the instrument under which the obligation arose, and the demand and payment. The burden of proof of the indebtedness is not upon us. because the original indebtedness is proved by the bond. *8 M. & W.*, 538. Compulsion is not necessary. A payment made or an adjustment of accounts is sufficient.

There is distinct evidence of the debt apart from the bill and receipt. The loan was made in 1873, and Fyshe became cashier in 1875. He has only to prove what balance was due. We show that there was a balance due after the last instalment was paid; the *onus* would be upon them to show that they paid it. Their own statement of account between the Bank of Nova Scotia and the Bank of Liverpool shows that there was a balance due.

Where a principal debtor and the creditor adjust accounts and the principal pays the balance, the surety cannot claim that it is paid by virtue of an appropriation which the principal himself has never claimed. The debtor had a right to waive the benefit of that appropriation, and the surety is bound by his conduct in that respect. *DeColyar on Guarantees*, 355, *note*. The payee can make an appropriation at any time up to payment. *Tudor's L. C.*, 21. Where there has been no application by the debtor the creditor is not bound to appropriate it to the secured debt. *DeColyar*, 428; *1 Starkie*, 153; *3 Bing.*, 71; *2 M. & Sel.*, 18; *L. R., 9 C. P.*, 692; *4 Q. B.*, 792; *10 Grant's Ch. R*, 523; *DeColyar*, p. 430, note; *3 B. & Ad.*, 407, (as to burden of proof.)

As regards the parties. The suit at present is by M. P. Black and C. H. M. Black.

The contention is that evidence should not have been admitted that W. L. Black was dead. It sufficiently appears in the declaration that he was dead. We set out that it was made by the three and bring the action in the name of two. The bond is described as made to W. L. Black in his lifetime.

Ritchie, Q. C. (with the *Attorney-General.*)—Part of the acceptances were used to pay the instalment overdue on the 13th July, 1874. At the date of the account sent January 1st, 1875, part of the $16,500 mentioned in it had already been paid on account of the previous instalment. The acceptances, ($16,500,) were appropriated strictly to the payment overdue on July 13th, 1874, and as soon as that instalment was paid the acceptances were all turned over under the agreement of October 11th, 1875, for the payment of the general indebtedness. (WEATHERBE, J.—I don't read that as meaning anything of the kind.) The question of pleading lies back of this, that the mis-appropriation has not been pleaded.

Rigby, Q. C., in reply.—Before the payment by Black the securities, appropriated as we contend they were, had ripened into money, and therefore the objection as to the pleading does not apply. *24 Beav.*, 186. Mr. Black knew that this appropriation had been made, as it had been communicated to him by Patterson. The indenture of October 11th does

not in fact change the appropriation. It merely appropriates the balance over and above what was needed to pay the special account to the payment of the general indebtedness of the bank. *DeColyar*, 427, 438.

Our account was the older account. The debt dates from the time the money was borrowed.

There is no default shown from the Bank of Liverpool to the Blacks. Defendant merely guaranteed the liability of the Bank of Liverpool. There should be a demand shown by Black on the Bank of Liverpool.

The death of W. L. Black should have been stated. It is not sufficient that it can be inferred from the words "in his lifetime." It is not absolutely clear from such words that the third man is not still living, and, if living, the other two cannot recover.

SMITH, J., prepared the judgment of the Court, which was read January 14th, 1882, by JAMES, J.:

In this action the plaintiffs seek to recover from the defendant the sum of $844.99, which they allege is payable under a bond given by the defendant to them on the 19th July, 1873. The recital and condition of the bond are as follows:

"Whereas, the Bank of Liverpool being unable to meet its liabilities, requested the Bank of Nova Scotia to advance the sum of $80,000, which the said Bank of Nova Scotia agreed to do, upon Charles H. M. Black, William L. Black, and Martin P. Black executing a bond to the said Bank of Nova Scotia, binding themselves to make good any loss they might incur by reason of said advance of the sum of $80,000, to the extent of $60,000; and whereas, I hold one hundred shares in the said Bank of Liverpool; and whereas I have agreed, in case the said Charles H. M. Black, William L. Black and Martin P. Black should be called upon to pay all, or any portion, of the said sum of $60,000, to pay a proportion thereof.

And whereas, the said Charles H. M. Black, William L. Black and Martin P. Black, have given their bond to the said Bank of Nova Scotia, conditioned for the payment by them of the amount remaining unpaid by the Bank of Liverpool

to the said Bank of Nova Scotia of the said sum of $80,000 to the extent of $20,000, on the 19th day of January now next, to the extent of the further sum of $20,000, on the ninth day of July, which will be in the year 1874, and to the extent of the further sum of $20,000 on the ninth day of January, which will be in the year 1875.

Now, therefore, the condition of this obligation is such that if the above bounden John W. Barss, his executors or administrators, shall pay, or cause to be paid to the said Charles H. M. Black, William L. Black and Martin P. Black, their executors, administrators, or assigns, five-sixtieth parts or shares of the amount they, the said Charles H. M. Black, William L. Black, and Martin P. Black, their executors or administrators shall pay to the said Bank of Nova Scotia, under and by virtue of any condition, matter, or thing contained in the said bond so given by them to the said Bank of Nova Scotia, then this obligation to be void, otherwise to remain in full force and virue."

The plaintiffs' declaration alleges that the bond given by them to the Bank of Nova Scotia bound them to *make good any loss* that might occur to said Bank, by reason of the advance of $80,000 made by them to the Bank of Liverpool up to a specified amount; and likewise avers that the bond of the defendant upon which they seek to recover, obligates the defendant to pay them five-sixtieth parts or shares of the amount they or their executors, &c., should pay to the said Bank under and by virtue of any *condition, matter or thing* contained in said bond so given by them to the Bank. And, therefore, if they could recover against the defendant on his bond, it is clear they could only do so to the extent of five-sixtieths of what the plaintiffs were compelled to pay to make good *any loss* sustained by the Bank, which loss it was incumbent upon the plaintiff satisfactorily and legally to prove.

The cause was tried at the November sittings of the Supreme Court in 1880, and a verdict by consent passed for the plaintiffs for $883.64, subject to the opinion of the Court, with liberty to draw inferences of fact as a jury might, and with power to reduce the amount of the verdict, or set it aside, and enter judgment for the defendant. A rule *nisi* was accordingly taken out and argued before the Court *in banco*.

The action was originally brought in the names of not only the present plaintiffs but joined with that of Mary Black as executrix of the last will and testament of William L. Black, one of the obligees in defendant's bond. At the trial Mr. Ritchie moved to amend the writ by striking out the name of Mrs. Black, which the learned Judge who tried the cause, permitted to be done. That William L. Black was dead at the time when the suit was brought is in evidence, and there is no allegation in the writ of that fact. This point was urged by Mr. Rigby, at the trial, as one of his grounds, when applying for a non-suit, and I must confess that without such an averment I do not see how the plaintiff can succeed in the present state of the pleadings. It is true, as I have stated, the death of William L. Black can be gathered from the evidence, but I do not see that this obviates the necessity of an averment so essential to the present plaintiffs' recovery on a bond given to them and another who, as far as the record shows, may be living, and should have been joined in the action. I am of opinion that this is a fatal objection to plaintiffs' right to retain their verdict.

Were this difficulty even removed out of the plaintiffs' way, I should still be compelled to hold that there is an insufficiency of *legal* proof to establish the precise indebtedness of the Bank of Liverpool to the Bank of Nova Scotia, which showed an ascertained "loss" incurred in consequence of the latter's advance of $80,000, which the Bank under this bond could be called upon to pay. The defendant's liability rests upon "the loss" to the Bank of Nova Scotia, as I apprehend on a perusal of the two bonds, and it was the duty of the plaintiffs satifactorily to define it by legal evidence, which I do not consider they have done.

For these reasons we think the rule *nisi* must be made absolute to set aside the verdict and judgment entered for the defendant with costs.

WEATHERBE, J.—I agree with the reason first mentioned by my learned brother, and also consider that there was no evidence to sustain the verdict, and that therefore judgment should be entered for the defendant with costs.

JOHNS ET AL. *v.* BARBOUR ET AL.

Before RITCHIE, E. J., and MCDONALD, JAMES and WEATHERBE, J J.

(Decided January 14th, 1882.)

Conveyance by Insolvent of all his property for benefit of creditors.—Effect as respects judgment subsequently recorded.—Injunction to restrain sale under judgment.--Cloud on title.—Apparently good title.

ROGERS & Co., on the 10th of May, assigned all their individual and partnership property, both real and personal, to a trustee, for the general benefit of their creditors, and executed at the same time a deed in trust to him of their lands, which was recorded 12th of May. Defendants entered a judgment against Rogers & Co. on the 15th of May, which was recorded the next day. On the 17th of May a writ of attachment was issued against Rogers & Co., under the Insolvent act of 1875, and in June creditors' assignees were appointed, to whom the trustee subsequently conveyed the lands, which were afterwards sold to certain of the plaintiffs who conveyed to others of the plaintiffs in trust to secure the purchase money to the creditors' assignees. Defendants proceeded to advertise and sell the land under execution, and plaintiffs sought to restrain them by injunction.

Held, That as between the parties to it the deed from Rogers & Co. to the trustee was valid, and that it was open to the creditors' assignees, if they considered it for the benefit of the estate, to have the property conveyed to them by the trustee; that the judgment creditor never obtained any lien on the property under his judgment; but that, although the Court would restrain a judgment creditor from selling property even under a judgment that would convey no title to the purchaser, and where the creditor only proposed to sell the right, title, and interest of the judgment debtor, yet it was incumbent on the plaintiffs to show that the cloud on their title was caused by what was apparently a good title, though in fact defective, and that in the present case defendants had not an apparently good title, as the first deed from Rogers & Co. appeared to convey the title.

WEATHERBE, J., concurring, limited his opinion with reference to the effect of the deed from Rogers & Co. to the trustee, to the case of a naked conveyance by the insolvent for the benefit of creditors.

This cause came on for argument July 14th, 1881, on appeal from the following judgment of the learned Judge in Equity, in which all the material facts are set out:

The plaintiffs seek to restrain the defendants from selling certain lands formerly owned by Benjamin Rogers and Joseph R. Rogers, under a judgment against them, entered on the 15th May, 1879, and recorded the day following. The ground on which the application for an injunction is made, is that previous to the entry and recording of the judgment by the defendants, the Rogers had conveyed the property, which became vested in the plaintiffs or some of them.

No material facts are in dispute. It is admitted that previous to the entry of the judgment, on the 10th of May, 1879, the Rogers made an assignment of all property, real and personal, which belonged to them, either individually or as

partners of the firm of B. Rogers & Son, to Henry Lewis, for the general benefit of their creditors; and, in connection with this assignment, they executed to him a deed in trust of the lands, which was recorded on the 12th May, 1879. On the 17th May, a writ of attachment was issued against them under the Insolvent Act of 1875, and their estates placed in liquidation. On the 4th of June following the plaintiffs, Johns and Murray, were appointed creditors' assignees, after which Lewis and the creditors who had become parties to the deed of assignment to him, conveyed the lands to Johns and Murray, who subsequently, as assignees, sold and conveyed them to plaintiffs, Adolphus Hatfield, Joseph R. Kinney and Augustus F. Stoneman, and they conveyed them to the plaintiffs, George B. Doane and J. Wentworth Moody, in trust to secure the purchase money to the assignees, Johns and Murray. When the defendants' judgment was entered and recorded, the Rogers had parted with all their interests in the real estate, and, so far as the defendants are concerned, they were not in a position to rely on any objection under the Insolvent Act, if any such existed. The statute of Elizabeth was referred to at the argument; but, so far from the conveyance having been in fraud of creditors, it was made for their benefit, and was made fairly and honestly with that object, and it was so far in accordance with the Insolvent Act that its effect was that all their creditors should participate, and prevent certain creditors being paid at the expense of the rest. After this conveyance, when the judgment was entered against the Rogers, the title to the lands, having passed out of them, became vested in Lewis, so that the defendants never had a lien on them, and a sale of them under their execution would be in violation of the rights of the plaintiffs who claim under him.

But it is urged that no injury will be done to the plaintiffs by such a sale, as if no right of selling under the judgment existed nothing will pass by the sheriff's deed. That I cannot assent to. It is calculated to involve them in litigation, as no person would purchase at such a sale, unless with the expectation of obtaining possession of the lands, and the existence of a sheriff's deed of the land to another would cast such a shade on the title as would be a serious impediment to their selling

the property; in addition to which a summary mode of obtaining possession of land purchased at sheriff's sale, under execution, is given to the purchaser by a late statute. Two cases were cited by the defendants' counsel, *Thorne* v. *Torrance*, 18 U. C. C. P., 29, and *Case* v. *Palmer et al.*, 2 Hannay, 183, the former in support of the position that the deed to Lewis was void, and the latter that, whether void or the reverse, the holder of the judgment should not be restrained from selling.

Though not bound by the decisions of Courts in other Provinces of the Dominion, respect will always be paid and every consideration given to them by this Court. *Thorne* v. *Torrance*, however, loses much force from the fact that out of a Court composed of seven Judges, three dissented from the judgment, and there the question was not like this, whether an injunction could be sustained; for had it been, we may infer from the language of the Chancellor who pronounced the judgment of the majority, that had the application been similar, an injunction would have been granted. He said; "It is another question whether the judgment creditor might not be disabled by a proper application to me or to either of the other Courts from insisting on his writ as against the proceeding in insolvency. It is one thing to set aside or prevent the use of a writ and another to deny it while in force its legal operation.

In *Case* v. *Palmer et al.*, the Court dissolved an injunction to restrain the sheriff from selling under an execution at the suit of one who claimed to have purchased under a former sale, on the ground that the judgment creditor had no *locus standi* to contest the plaintiffs' title till after a sale, and that no injury would be done to him, as if his title were good it could not be affected by the sale, and that the title of the plaintiffs was only determinable in a Court of Law. The learned Judge who heard the cause on the Equity side of the Court, whose judgment was affirmed on appeal, said that he was not aware of any principle of equity by which a creditor could be restrained from levying on property which he claimed to belong to his debtor and trying out the title of the person in possession. I cannot help thinking that there are many grounds on which he might be restrained, and a Court of Equity, it appears to me, is the tribunal in which such a case

... most properly tried. Unless fraudulent as ... the deed to Lewis is valid; it is registered ... priority over the defendant's judgment, and ... course, if he wished to dispute its validity, ... to this Court and have it declared invalid, ... creditors were concerned. As between the Rogers ... is unquestionably valid. I cannot concur in the ... the validity of the deed can only be tried by the ... after a sale; it appears to me desirable, in every ... the case, that the validity of a prior recorded instru- ... should be established previous to a sale under a subse- ... judgment, otherwise few persons would be disposed to bid ... the property, and whoever would become the purchaser ... merely buying a lawsuit, the result of which would ... necessarily uncertain, and such a speculator would not be ... willing to give anything like the value of the property. I much prefer following a decision of our own Courts, *Caldwell et al.* v. *Kinsman et al.*, James' Rep., 398. There the plaintiffs, having recovered a judgment against Kinsman in Equity, before taking out an execution applied to set aside a deed made by him as having been fraudulently made to defeat them as creditors. The counsel for the defendants took the objection that the plaintiffs, not having issued an execution, had not placed themselves in a position to question the validity of the conveyance, and the English practice under an elegit was referred to in support of the contention. The Master of the Rolls, before whom the hearing took place, went fully into the question, and showed the distinction between the right which a judgment creditor had under his recorded judgment here and that which was acquired under an elegit in England. Until the issue of the elegit no lien on the land was acquired, but as soon as the judgment was recorded, a lien was at once acquired, which gave the plaintiffs a right to proceed in Equity to set aside a prior fraudulent conveyance of the land. The language of our statute is strong; it enacts that a judgment duly recovered and docketed shall *bind the lands* of the parties against whom the judgment shall have passed, after the registry thereof, as effectively as a mortgage; and I may remark that in the New Brunswick case the Chief Justice in affirming on appeal, said, "if the appellants' deed was

fraudulent and the judgment creditor attempted to set it aside without a sale, he would only do so if all the other creditors came in."

In this suit the creditors are represented, and it may be inferred that that Court, under similar circumstances, would have upheld the injunction. The rule for the injunction will be made absolute with costs.

The grounds taken in the petition for appeal were as follows:

1. That the deed in trust from B. Rogers & Son to Henry Lewis, recorded May 12th, 1879, and in said judgment mentioned, was fraudulent and void, and conveyed no right or title to the said Lewis in the lands therein described and mentioned.

2. That the defendants, by the registry of the judgment recovered by them against the said B. Rogers & Son, acquired a lien upon all the lands of the said B. Rogers & Son, including the lands in said deed of trust described, and were entitled to levy upon and sell said lands, under execution issued upon said judgment, and a sale under said execution would not be in violation of any rights of the plaintiffs.

3. That the said plaintiffs, Thomas W. Johns and Alex. S. Murray, as assignees of the said B. Rogers & Son, took the said lands, subject to the claim or lien of the defendants under their judgment.

4. That the plaintiffs had a right to sell, under execution issued on their said registered judgment, any interest or alleged interest of the said B. Rogers & Son in the said lands, and could not be restrained by injunction, or otherwise, from selling the same.

5. That if the said B. Rogers & Son have no interest in the lands to be sold under defendants' execution, the plaintiffs, or any other parties in possession of said lands, would have a good and available defence in law against a purchaser, and the interference of a Court of Equity is not necessary.

Pelton, Q. C., for appellant.—The deed in trust to Lewis and the other parties was an act of insolvency, and, therefore, void, and conveyed no title to the grantees. Section 3, subsection *j*, in *Clarke's Insolvent Act*, page 36, defines an act of

insolvency in such a way as to cover the assignment to Lewis. If followed by an attachment, the assignment is void as against the assignee. *Clarke*, 44 and 45, and cases there cited; *Stuart* v. *Moody*, 1 C. M. & R., 777; *Watcherly* v. *Lancaster*, 1 Ad. & El., 77; *6 Meeson & W.*, 149; *Thorne* v. *Torrance*, 16 U. C. C. P., 445. In this case the issue of a writ of attachment was held to invalidate a prior voluntary assignment made for the benefit of creditors as an act of insolvency, so as to let in an execution issued after the voluntary assignment,—and that result followed, although the judgment creditor was the person who issued the attachment. The case arose under the Ontario statute, the clause in which is identical with that of the Insolvent act of Canada, 1875. *Rose* v. *Brown*, 16 U. C. C. P., 477; *Graham* v. *Witherby* and *Graham* v. *Lyons*, 7 Q. B., 490; *Goldschmidt* v. *Hamlet*, 6 M. & G., 187; *Cheston* v. *Gibbs*, 12 M. & W., 111.

Even assuming that the assignment in trust was good, the judgment creditor had a right to sell whatever interest the debtor had in the land. *Acts of 1879*, ch. 17, sec. 13. There may have been a surplus. *Case* v. *Palmer*, 2 Hannay, N. B. R., 183.

The plaintiffs would have had an available remedy at law against any purchaser at the execution sale, and, therefore, the interference of a Court of Equity was not necessary. *2 Story's Eq. Jurisp.*, sec. 894.; *Drake* v. *West*, 22 L. J. N. S.; *S. C. 17 Eng. L. & E.*, 367; *Harrison* v. *Nettleship*, 2 My. & K., 423; *Webster* v. *South Eastern Ry. Co.*, 1 Sim. N. S., 272.

The learned Equity Judge seems to think that the summary mode of procedure to recover land purchased at sheriff's sale, by the Local act of 1878, affects the question, and renders an injunction more necessary; but the party in possession has the same remedy to keep the purchaser out of possession as formerly. The summary nature of the procedure does not at all interfere with the principle that the Equity Court will not interpose where there is an available remedy at law. *Insolvent Act of 1875*, sections 82, 97, 106.

Bingay, Q.C., contra.—The contention of the defendant is in effect that the very fact of an attachment which is intended

to produce an equitable distribution of the assets must, in this case, have the effect of preventing such a distribution, and give a preference, and the case of *Thorne* v. *Torrance*, 16 U. C. C. P., 445, is cited. This case was under the Canadian statute of 1864, which is different from our statute of 1875. There was no section in it similar to section 83 of our act, which is commented on by *Clarke*, in his work on the *Insolvent Act*, page 37, where he refers to the cases of *Thorne* v. *Torrance* and *Rose* v. *Brown*, and to the omission of section 83 in the Canadian act of 1864. *Dumble* v. *White*, 32 U. C. Q. B., 601. The moment the property was assigned to Lewis the debtor ceased to have any interest in it. Even if the assignment to Lewis was made void by the attachment, it is in favor of the assignee, who is the only person that could take advantage of it. Insolvent act, section 39, gives him the exclusive right to take proceedings, and he is the only person who could attack the validity of the prior assignment. The judgment creditor cannot do so. If the assignment be void as to the distribution of the assets, it is sufficiently good to pass the interest in the proerty. *Philpots* v. *Philpots*, 10 C. B., 85; *Doe e. d. Roberts* v. *Roberts*, 2 B. & Ald., 367; *Bessey* v. *Windham*, 6 Q. B., 166; *Doe e. d. Williams* v. *Floyd*, 5 Bing. N. C., 741. The Courts will only set aside the deed in such cases in so far as the exigencies require, even where the statute says it shall be null and void. It will only be treated as null and void in so far as is actually necessary to meet the purpose contemplated by the statute.

White v. *Simmonds*, L. R., 6 Ch., 655, is a case relating to mortgages. This case shows that the question here should have been first tried in the Insolvent Court, and also rebuts the position that an execution should have been issued before injunction applied for. *Ex parte Stray*, L. R., 3 Ch., Ap. 374. *Re Baker Trusts*, L. R. 10 Eq., 599, shows that even under the English act the assignment, which would be an act of bankruptcy, is not absolutely void for all purposes. During the currency of the assignment the judgment creditor had no lien, because the property was vested in Rogers, as trustee, and after the insolvency the trustee conveyed whatever interest he had in the property to the assignee. The assignee did not set it aside. Had he done so it might have been contended

that the judgment came in. He did not do that, but took an assignment from the trustee. (McDONALD, J.—It might become his duty at the instance of the judgment creditor to proceed to rescind that conveyance. He has made it impossible that he should do so.) The assignee is under the summary jurisdiction of the Court, and may be compelled to perform his duty. Section 125, *Insolvent Act.*

Rigby, Q. C., (with *Bingay.*)—Before the Insolvent act the assignment to Rogers would have been perfectly legal. Has any legislation passed avoiding it? If so, it is in the Insolvent act. The only thing we have is the Insolvent act, which declares under what circumstances a debtor's estate can be put in compulsory liquidation. The statute nowhere says that a voluntary assignment for the benefit of creditors, otherwise than as provided in the act, is either void or voidable. It only says that the debtor shall be deemed insolvent and subject to compulsory liquidation. Although liable to be made an insolvent, he may never become so. If nothing is done within three months the only consequence attached to the voluntary assignment is removed. It ceases to be even a voidable conveyance if it ever was such. Sections 130 and 132 and following sections refer only to certain contracts which shall be void, and certain others which shall be voidable. None of those provisions covers this case, and therefore it is left, as at Common Law, a valid conveyance.

We attack in this case the issue of the execution. Under section 83 no lien is created, except for costs, if before the payment of the money a writ of attachment has issued. We don't attack their lien under their judgment, but when they seek to issue an execution, we step in under this section and ask that it should be restrained.

In *Almon* v. *Gray*, Ritchie's Eq. Dec., 1, the Judge in Equity decided that a recorded attachment could not get priority over an attachment under the Insolvent act, on the ground that the Provincial act was overriden by the Insolvent act.

The judgment is practically a confession. It was a default, and was in contemplation of insolvency. The insolvent's duty was to make an assignment.

If the effect of the voluntary assignment is the same as an act of bankruptcy in England, then the judgment itself is

bad, and the assignee's rights would relate back to tke date of the trust deed and destroy the judgment. *Dickinson* v. *Grank Trank Ry. Co.*, 15 Beav., 260; *Story's Eq. Jurisp.*, sec. 896, note *a*; *Story's Eq. Pl.*, sec. 730, note *a*.

Meagher, Q. C, in reply.—The only ground relied on is that by the issue of the execution we are seeking to obtain an unjust preference. There is nothing in the act to authorize this proceeding.

The deed to Lewis was executed by some creditors, and was irrevocable. What right had Lewis to convey to the assignee? That was not provided for in the trust deed. It does not follow that the assignee would have avoided that trust deed and the conveyance by the trustee was a breach of trust.

The two questions in this case are, first, whether that deed to the trustee is void or voidable; secondly, whether, even supposing it to be voidable only and not void, the Court will, under these circumstances, restrain us.

Clarke's Insolvent Act, p. 44. The trust deed must necessarily obstruct, delay, or hinder some of the creditors. If so, it is expressly made void. (Section 132.)

The lien on the real estate is not taken away, and yet it is contended that the statute takes away the only means of enforcing it. I admit that the words of the statute are enough to take away the lien on personal property by the delivery of an execution to the sheriff.

That act gives the property to the assignee under the same charges and obligations as the insolvent was liable to, and therefore subject to the lien.

Sections 39 and 125, cited on the other side, do not apply, and the cases cited to show that a deed might be void for one purpose and not for others, were every one of them under a special statute. One of them applies to deeds of property made for the purpose of conferring votes, and simply construed the statute to mean that the vote was taken away but the deeds were good. Cites *Murdoch* v. *Walsh*, (unreported.)

Clarke, p. 34, shows that merely suffering default is not giving a preference.

Robson on Bankruptcy, p. 325, citing *Slayter* v. *Pender*, L. R. 6 Exch., 218, affirmed on appeal, and *L. R. 7 Exch.*, 95, show that an execution creditor's rights will not be interfered with, except when expressly taken away by statute. The judgment is a perfectly good one, and there is no ground on which they could set it aside, yet that is a part of the prayer of the bill. The bill alleges nothing whatever about a cloud on the title. All the plaintiff says is that we are acting in prejudice of his rights. He must show the grounds on which he seeks to restrain us. *Forrest* v. *Muir*, Ritchie's Eq. Dec., 58.

Suppose there was a surplus, the judgment would attach, and we should not be restrained. We cannot compel the assignee to set aside the trust deed, because he is a party to it. (RITCHIE, E. J.—If the trust deed is voidable, could you not bring an action to set the whole proceedings aside?) I think the case of *Grant* v. *Wheeler* (unreported) would be against that.

Cites *High on Injunction*, sec. 86.

The COURT, now, (January 16th, 1882,) delivered judgment.

RITCHIE, E. J., prepared the following opinion, which was read, in his lordship's absence, by MCDONALD, J.:

I cannot arrive at the conclusion that the deed in trust from B. Rogers & Co. to Lewis for the general benefit of their creditors, was fraudulent and void, and that no title to the lands intended to be conveyed passed under it. It is admitted that there would be no grounds for calling in question its validity, were it not that proceedings had been taken against the grantor under the Insolvent act, and if no proceedings had been taken within three months, its validity never could have been impeached. To make a deed of the insolvent void under the Insolvent act, which would otherwise have been valid, it must be declared to be so. No section of the act declares such a deed as this void, made as it is, for all the grantor's creditors, without any preference, and with no intention of defrauding them. Though not void, it may be voidable under the section on which the defendants rely, which declares under what circumstances a debtor shall be deemed insolvent, by one of the sub-sections of which it is provided he shall be,

if he has made any general conveyance or assignment of his property for the benefit of his creditors otherwise than in the manner prescribed by the act. The object of this section is merely to declare by what acts a party is liable to be brought into insolvency, if taken advantage of within a limited period. As between the parties to it this deed would be valid, and it appears to me that the utmost that can be said of it is that, as the insolvency took place, it is voidable as against the assignee; and the cases cited, I think, shew that it is open to him either to avoid it or, if he considers it most for the benefit of the estate, not to call in question its validity, but to have the property conveyed to him by the grantee.

The right of an assignee to affirm or invalidate an act voidable as in contravention of the bankruptcy acts is recognized in *Smith* v. *Hoben*, reported in 2 Smith L. C., and several cases to the same effect are referred to in the notes, and in *Cooper* v. *Chitty*, 1 Smith L. C., the distinction is referred to where the title of the assignee relates back to the act of bankruptcy and where it does not; and, in the notes to page 515 of the 7th edition, it is laid down as the result of the cases, that where there is no relation back, a fraudulent transfer which would have been void as an act of bankruptcy had there been relation back remained valid until impeached by the assignee. In *Heilbut* v. *Nevill*, L. R. 4 C. P., 359, referring to a preference in violation of the Bankrupt act, WILLES, J., says; "The law of fraudulent preference is quite distinct from any relation back of the assignee's title; it entitles them to say that the bankrupt has made an assignment of any of his property to one of his creditors, and that the transaction, as against them, shall be void. In *Marks* v. *Feldman*, L. R. 5 Q. B., 275, it was held that, an assignment to a creditor by a debtor, though it was not void as an act of bankruptcy to which the assignee's title could relate, yet as the transaction amounted to a fraudulent preference, was voidable at the election of the assignees as contrary to the spirit of the bankrupt laws." KELLY, C. B., said; "If a man, at a time when he contemplates bankruptcy, delivers goods or money into the hands of a creditor whom he intends to benefit, that transaction is perfectly valid between the parties; but if bankruptcy supervenes, it is a fraudulent preference, and

invalid as against the assignee," and he held it to be voidable at his suit. And *Smith* v. *Baker*, L. R. 8 C, P., 350, is an authority for the position that an assignee in bankruptcy may either have a conveyance by the bankrupt declared void or he may obtain the benefit of the conveyance for the creditors by recognizing it and taking under it, as was done here. In *Stevenson* v. *Newnham*, 13 C. B., 301, PARKE, B., referring to the conveyance of a debtor where the assignee has the right of treating it as a fraudulent preference, says; "Such an act, when voluntary and in contemplation of bankruptcy, cannot be valid against the assignees if they choose to avoid it, but is not absolutely void; the fraud only gives a right to rescind. In the first instance the property passes in the subject matter and fraud only gives a right to avoid a contract or purchase; the property vests till avoided."

Applying these cases to the present, the property passed under the deed from Rogers & Son to the trustee, Lewis, and so far from the assignee in insolvency having avoided it, he has affirmed it by taking under it. Under these circumstances, I think the defendants, having obtained their judgment against Rogers & Son, after they had parted with the property in question, never obtained any lien upon it.

Since the argument Mr. Pelton has referred us to *Pigelow on Estoppel*, 114, but it has no application to this case; it merely sustains the position that a party who has had an opportunity to make defense to an action is estopped, after judgment, from re-litigating the same matter in Chancery.

But it is contended that this Court will not enjoin the defendants from selling under their judgment, as, if they have no lien on the land in question, nothing will pass under the sale, and therefore no injury would be done to the plaintiffs. That this Court will interfere by injunction for the purpose of restraining a judgment creditor from executing his judgment, in certain cases, cannot be questioned, and it would be a good ground for an injunction if, by the sale under the execution, a cloud were cast on the plaintiffs' title. In *High on Injunction*, sec. 117, it is said; "Courts of Equity frequently enjoin proceedings under judgments for the prevention of a cloud upon titles, and this would seem to follow by analogy from the well settled and recognized jurisdiction of

Equity to remove clouds upon titles, since if the Courts may, for the purpose of preventing litigation and expense, exercise jurisdiction for the removal of a cloud on a title, it is difficult to perceive any substantial reason why the same jurisdiction may not be exercised to prevent such a cloud. It may therefore be laid down as a general rule that a sale of real estate under execution, which will not at law confer any title on the purchaser, and whose effect will be to cast a cloud upon a *bona fide* purchaser, may be enjoined; nor in the application of the rule will it avail against the issue of the injunction that the levy was a levy made on the "right, title and interest of the defendants." The question, however, arises in this case, whether by a sale under this judgment a cloud is cast on the plaintiffs' title, as the deed from Rogers & Son, under which they claim, was given and recorded prior to the defendants' having obtained their judgment against them; and to induce the Court to interfere, it must be shewn that what would cause the cloud was apparently a good title, though in fact defective, and, as between the judgment of the defendant and the plaintiffs' deed, the latter appears to convey the title. I am disposed to think that, on this ground, the appeal should be sustained.

WEATHERBE, J.—The assignment for the general benefit of creditors recorded to bind the debtors' land, on the 12th of May, conveyed their title to the assignee, Lewis, and, on the 16th day of May, when defendants' judgment was recorded to bind land under the statute, the conveyance intervened. But for the attachment under the Insolvent act, defendants would have been in the position of every other creditor under the assignment to Lewis. Under the act everything passed to the insolvents' assignee and afterwards to the creditors' assignee, and the assignment to Lewis must have been held to be in contravention of the act. The question seems to be, whether by the operation of the attachment the assignment to Lewis, which could not have been sustained as against the creditors' assignee, is to be regarded as void, so as to give efficacy to the judgment of defendants, permitting the operation of our registry act to create a lien on the insolvents' land, so as to cut off the other creditors, just as effectually as

it would have done if no assignment had ever been made to Lewis. This is a difficult question to answer, and I am not surprised that it has occupied the attention of the Equity Court, nor that it has reached us on appeal.

I can see no reason for dissenting from the opinion of the learned Judge in Equity, that the appeal ought to be sustained, because, whatever may be the answer to the main question, this is not a case for the interference by injunction. I have more difficulty with the principal subject in dispute. Lewis has made a conveyance to the creditors' assignees, who join those who have purchased the real estate in objecting to the defendants' obtaining the preference they would be entitled to if no conveyance to Lewis stood in their way.

On behalf of the plaintiffs it is argued that though that deed to Lewis might have been avoided by the creditors' assignee, it operates against a judgment subsequently recorded so as to prevent a sale under execution by defendants; that though the deed to Lewis for the benefit of creditors is radically affected by the Insolvent act, it is not entirely destroyed; that as between the judgment creditors and the whole body of creditors, represented by their assignee, it stands, and by its prior registry deprives the defendants of their claim to levy an execution against the land; that the assignment to Lewis was not void but only voidable, and that only by the creditors' assignees, should they see fit to take proceedings.

Thorne v. *Torrance*, 18 U. C., C. P., 29, was cited by defendants' counsel as well as *Goldschmit* v. *Hamlet*, 6 M. & G, 187, and *Graham* v. *Witherby*, 7 Q. B., 490. *Thorne* v. *Torrance*, decided that a conveyance for benefit of creditors by a judgment debtor not in compliance with the Insolvent act, was so completely avoided by proceedings subjecting the estate to compulsory liquidation as to give priority to an execution in the sheriff's hands, which otherwise would have been deferred; a minority of the Judges dissenting, but only on the ground, as I understand, that the judgment creditor who sought precedence for his execution was estopped by his conduct in instituting the insolvency proceedings to that end. This Ontario case was decided by able judges, and it was avowedly based on the English authority of *Graham* v. *Witherby*. There the sheriff seized goods under execution on a judgment entered up

on a warrant of attorney which, but for the statute, had priority of an execution on a default also in his hands. The first writ was defeated by a fiat in bankruptcy, at the instance of the assignee, notwithstanding which the second execution took precedence of the fiat on the ground that the first writ was void, not only as against the fiat but against the subsequent execution and absolutely. Lord DENMAN, in giving judgment, pointed out that the decision of the Court could not be otherwise than it was, without treating the case of *Goldschmit* v. *Hamlet*, already mentioned, as having been wrongly decided —though he does not support the decision by independent reasoning—and the first writ was held to be void, which let in the second to the exclusion of the first. It is stated in the judgment that the Court had refused to set aside such a writ as being void, in *Taylor* v. *Taylor*, 5 B. & C., 392, but that the Court in *Cheston* v. *Gibbs*, 12 M. & W., 111, had overruled the view taken in *Taylor* v. *Taylor*, by establishing that the statute affected the writ itself, and not its operation alone, and rendered it void. It would appear, therefore, that *Graham* v. *Witherby*, and hence *Thorne* v. *Torrance* depend solely on the authority of *Cheston* v. *Gibbs*, so that, it appears to me, it will be useful to examine the history of that case. PARKE, B. delivered the judgment of the Court in *Chester* v. *Gibbs* in 1843, and a similar question arose in the Exchequer Court in 1854 in *Congreve* v. *Evetts*, 10 Exch., 298, in which latter case the same distinguished Judge delivered the opinion of the Court of Exchequer. The plaintiff had a bill of sale which would prevail over an execution against the same property covered by that conveyance. Bankruptcy of the debtor intervened. It was held that though the bill of sale might be avoided by the title of the assignee, yet it remained valid as against the judgment creditor, who would otherwise, and in case the bill of sale was held to be inoperative altogether, get the proceeds of the property and cut them off from the assignee. "Therefore," said PARKE, B., "If there be no binding authority to the contrary, we should hold that the plaintiff who had a prior right, by virtue of the bill sale, against every execution creditor, though not against the insolvent assignee, had a clear right to recover the proceeds in this case." * * * * * He then proceeds: "The only question which remains is

whether there are any authorities against the plaintiff. The first relied on is *Goldschmidt* v. *Hamlet*, 6 M. & G, 187. The question between the creditor on a judgment on a warrant of attorney and the first creditor on an adverse judgment was not the subject of any one issue, and was never presented in a proper shape to the Court in the course of the argument, as a direct subject of decision. The observations of the judges on the other issue, no doubt, were unfavorable to the plaintiffs case, but the assignees being in that case clearly entitled to nothing, the Court do not seem to have fully considered the question as to the right against the first and other execution creditors. A similar observation may be made on the case of *Graham v. Witherby*, 7 Q. B., 491, which proceeded partly on that of *Goldschmidt* v. *Hamlet*. Many of the observations made by Lord DENMAN in giving judgment, are decidly favorable to the view we take, and the decision appears to have been founded on a mistaken view of the meaning of this Court in the decision of the case of *Cheston* v. *Gibbs*, 12 M. & W., 111. This Court decided that the 108th section of the 6 Geo. IV. Cap. 16, affected the operation of the writ, and did not merely direct the application of the money levied under it; and that the sheriff was a wrong-doer in acting contrary to the statutory direction coupled with those of the writ. We never held the writ to be void, as the Court of Queens Bench seems to have supposed, in *Graham Witherby*, p. 515, and thence deduced the consequence that it was void altogether, and so the defendants, writ in that case was therefore the first valid writ. We never meant to say more than that the sheriff in disobeying the writ and the clause in the act of Parliament directing its operation, was dealing wrongfully with the goods which, but for that writ, would be the property of the assignees, and therefore was responsible in an action of trover. We cannot therefore consider that either of these cases binds us as authorities, and we prononuce our judgment for the plaintiff."

I am not sure, from a perusal of the opinion in *Thorne* v. *Torrance* of RICHARDS, C. J., in the Court of Common Pleas, whether, but for *Graham* v. *Whitherby*, his decision would have been otherwise, but that judgment seems to rest mainly on that case. It is true there is some independent argument, but it is this, that the clause of the Ontario Statute

(our section 130) providing that all contracts by which creditors are hindered or delayed, made by a debtor unable to meet his engagements with a person knowing such inability, shall be presumed to be made with intent to defraud creditors, applied to the case in hand.

We are not made aware, I think, what were the terms of the assignment in *Thorne* v. *Torrance*, and I am not sure that there may not be something in the terms of that deed to render it under the very words of the act null and void. In that case the Court, I think, would not require to resort to the English authorities, which would not perhaps apply. No copy of the conveyance for the benefit of creditors is furnished us here, and I wish to be understood as limiting my opinion only to a case where there is merely a naked conveyance by the insolvent of all his property in trust for the benefit of all his creditors. If section 130 applied, so I think did section 132, and in that case it seems to me clear that the assignment to Lewis would be void absolutely, and so let in the defendants. It was forcibly urged by Mr. Rigby for the plaintiffs, that the assignment to Lewis would have been good before the act, and if void now it must be by reason of something in the act, and he required us to say whether sections 130, 131, 132, or 133 applied. It was not pretended by the defendants' counsel that there is any statute pronouncing in terms such a conveyance for the benefit of creditors, null and void.

For these reasons, I am unable to see that the defendants are entitled to a priority by reason of the issue of the writ of attachment and the insolvency, a priority which they could not otherwise claim, and, putting the conveyance from Lewis to the creditors' assignee out of the question, it seems to me that the conveyance to Lewis for the benefit of creditors could not be disturbed by defendants on the ground of their recorded judgment.

I have had an opportunity of examining the more recent English authorities cited by the learned Judge in Equity, which, I think, support his opinion just read, with which I cannot but agree.

JAMES, J.—I concur in the opinion of the learned Judge in Equity upon this appeal, on the question of title; but I

have felt some difficulty in concurring in his last opinion on the operation of the injunction. If the injunction be refused the defendant will, as he has already advertised, proceed to sell at auction the land purchased by some of the plaintiffs from the assignees in insolvency. The purchaser may then record the sheriff's deed and hold it for an indefinite period as a threat against the plaintiffs' title. This, under the circumstances before us, who have heard able counsel contend and cite many authorities to shew the validity of the judgment as against the plaintiffs' prior right, would, in my opinion, constitute a very serious cloud on the plaintiffs' title, so serious as to render it incumbent on him to adopt legal measures to establish his right before he could advantageously dispose of the land. If the plaintiffs had not commenced this suit in Equity, in which they pray for relief against the defendants' judgment; or if, from any cause, such as infancy or coverture, it were made appear to us that any obstacle existed to the plaintiffs being able to obtain a speedy adjudication; or, if it were shewn that any loss or damage would happen to the plaintiffs from our refusal to grant the injunction which the Judge in Equity could not redress in his decree, I think we should dismiss the appeal. But, under the circumstances of this case, I think the learned Judge did not exercise a sound discretion in granting the injunction, because it was unnecessary, and that he very properly reverses that judgment in his opinion, which has just been read, and in which I concur.

HOLMES *v.* DAVISON.

Before McDONALD, SMITH, JAMES, and WEATHERBE, JJ.

(Decided January 14, 1882.)

Bond for sale of land.—Failure to complete purchase.—Agreement to apply money paid on account of purchase to rent.—Recovery back of money paid on purchase in excess of rent.

DEFENDANT entered into a bond to plaintiff under seal in which it was recited that plaintiff had agreed to purchase from defendant a tract of land for $1200, with interest as follows, one year's interest to be paid in one year from date of bond, one year's interest in two years, and one year's interest, together with principal, in three years. It was further specified that if default should be made in the payment of the principal or interest as agreed upon, plaintiff should become a tenant to defendant at an annual rent of $72, and that all payments made by plaintiff, or upon certain specified notes of hand endorsed by way of security for the purchase money, should be applied to the interest or rent, as the case might be. Another part of the agreement stated that whatever sums were applied, as aforesaid, the remainder should be applied to reducing the principal sum; and further, that in the event of plaintiff failing to pay as aforesaid and surrendering up the premises at the end of the three years, all payments made in that case being applied towards rent at the rate aforesaid, the said note and the said endorsed note shall be given by the said defendant, &c.

Held, that plaintiff was entitled to recover the amount that he had paid defendant over and above the amount appropriated towards the rent for the period for which he occupied.

Defendant made an agreement by bond to sell land to plaintiff and to accept payment therefor in instalments secured by promissory notes. It was part of the agreement that if plaintiff failed to complete the purchase by paying the full amount of the consideration money he should be treated as a tenant and the payments made by him appropriated to the payment of rent at a rate agreed upon. The purchase not having been completed, plaintiff brought action to recover an amount paid in excess of the rent agreed upon. The cause was tried before the County Court Judge for Cumberland, sitting at Parrsboro, with a jury.

The following document was put in evidence by plaintiff:

Know all men by these presents that I, Vickery Davison of Parrsboro, in the County of Cumberland, Province of Nova Scotia and Dominion of Canada, Farmer, am held and firmly bound to Daniel Y. Holmes of Parrsboro, aforesaid, Trader, in the sum of twenty-four hundred dollars of lawful money of the said Province, to be paid to the said Daniel Y. Holmes, his certain attorney, &c., &c.

Whereas, the above bounden Vickery Davison hath agreed to sell to the said Daniel Y. Holms, the tract of land and

premises hereinafter described, that is to say, &c., &c., and the said Daniel Y. Holmes hath agreed to purchase the said lot of land, with the improvements thereon, from the said Vickery Davison, and to pay him for the same the sum of twelve hundred dollars, lawful money of the Province aforesaid, with interest thereon in manner following, that is to say, one year's interest on the said sum in one year from the date hereof, one year's interest on the said sum in two years from the date hereof, and one year's interest on the said sum, together with the said sum of twelve hundred dollars, in three years from the date hereof, according to the tenor of a certain note of hand, bearing even date herewith, and made by the said Daniel Y. Holmes payable to the said Vickery Davison or his order.

And whereas, the said Daniel Y. Holmes has endorsed to the said Vickery Davison or order, two certain notes of hand dated the 22nd day of January, A. D 1871, for two hundred dollars each, drawn by Francis Holmes and Hibbert Holmes in favor of the said Daniel Y. Holmes or order, the one payable in two years from the date hereof, with interest thereon after five months from the date hereof, and the other payable in three years from the date thereof, with interest thereon, from the first day of June next, as a collateral security towards the payment of the said note of hand for twelve hundred dollars, and interest, as before described; and whereas it is mutually agreed by and between the said Vickery Davison and Daniel Y. Holmes, that if default shall at any time happen in the payment of the said interest annually, or, and in the payment of the said principal sum of twelve hundred dollars in three years from the date hereof, that then and in such case the said Daniel Y. Holmes shall be a tenant under the said Vickery Davison at the annual rent of seventy-two dollars, payable annually, and that all payments made by the said Daniel Y. Holmes on account of his own note, or by the said Francis Holmes and Hibbart Holmes, or the said Daniel Y. Holmes on account of the said endorsed notes, shall be in the first place applied to the interest or rent, as the case may be. And it is further clearly understood by and between the said Vickery Davison and the said Daniel Y. Holmes, that if the said endorsed notes are not fully paid up as and when

they respectfully fall due, or within three years from the date hereof, the said Vickery Davison shall in no case whatever be responsible or held responsible for any more than he may actually receive on account of the same by whomsoever paid, and that any notice to the said Daniel Y. Holmes, as endorser thereof not being given by the holder of the said endorsed notes, in case they or either of them may not be paid at maturity, shall in no manner whatever render the holder or holders thereof in any way accountable for whatever may then or at any time thereafter be due thereon, and that whatever sum or sums may or shall be paid for or on account of the said endorsed notes, shall in the first place be applied towards the interest, as aforesaid, or the rent aforesaid, as the case may be, and then if applied towards the interest the remainder to be applied towards reducing the principal sum; and that if default happens in the prompt payment of the said sum of twelve hundred dollars and interest annually, as aforesaid, by the said Daniel Y. Holmes, his executors, administrators, or assigns, that then he, the said Daniel Y. Holmes, or his legal representative, shall and will, at the termination of three years from the date hereof, deliver or cause to be delivered to the said Vickery Davison or his legal representative, the quiet and peaceable possession of the aforesaid premises, together with all the improvements thereon, all payments made in that case being applied towards rent at the rate aforesaid, and that the said note, and the said endorsed notes shall be given up by the said Vickery Davison or his legal representative, without any recourse upon the said Vickery Davison, his heirs or assigns.

Now the condition of the foregoing obligation is such that if the said Daniel Y. Holmes, his heirs, executors, administrators or assigns shall well and truly pay or cause to be paid unto the said Vickery Davison, his heirs, executors, administrators or assigns, the said sum of twelve hundred dollars within three years from date hereof, together with the interest thereon annually, according to the term of the said note of hand drawn by the said Daniel Y. Holmes, and if upon payment thereof punctually being made at the several times and in the manner aforesaid, the said Vickery Davison, his executors, administrators or assigns, shall make, execute and

deliver to the said Daniel Y. Holmes, his heirs, executors, administrators or assigns, a good and sufficient deed of the lot of land and premises hereinbefore mentioned and described; then, and in such case these presents and every matter and thing herein contained shall be and become null and void. Otherwise remain in full force, virtue and effect.

Signed, sealed and delivered, in presence of
(Sgd.) A. O. BRADLEY. } (Sgd.) VICKERY DAVISON. [L. S.]

The declaration set out the bond substantially, and added that in the event of the failure to pay the full amount, as aforesaid, plaintiff was to have the benefit of all amounts overpaid, and exceeding that amount. And plaintiff says that default did happen in the payment for said property in the time limited therefor, and that besides paying the said rental of seventy-two dollars yearly, as aforesaid, said endorsed notes have been paid, making, with other payments, a further and greater amount, to wit: the sum of three hundred and seventy-four dollars and ninety-eight cents, being principal and interest due on payments made by plaintiff to the said Vickery Davison, and which said plaintiff, under said agreement or bond, claims to be entitled to from the defendant herein, being the legal representative of the said Vickery Davison, deceased And plaintiff further says that defendants as such administrator and administratrix, demanded and took possession of said premises from the plaintiff without offering or tendering him a deed of said property, and without carrying out the said bond or agreement in that behalf, made and provided thereby, causing great loss and damage to the plaintiff herein.

The learned Judge reported his charge and the verdict thereupon as follows:—

This cause was tried before me at Parrsboro, on the second day of December, A. D. 1879. During the trial I suggested to the counsel engaged, the propriety of having a jury, but as they seemed averse to this I deferred to their wishes, stating to them I would reserve my judgment, and in case I had any difficulty in coming to a decision, I would order a jury.

Subsequently at Chambers, Amherst, I told them I could not decide the question of fact as to whether the plaintiff had paid Vickery Davison on the twelfth day of December, A. D. 1874, the sum of five hundred and fifty-one dollars and thirty-six cents, or only the sum of three hundred and fifty-one dollars and thirty six cents, and I directed a jury to be summoned for the 6th day of January, A. D. 1880, and on this date I tried the cause anew. Defendant's counsel moved for a non-suit on these three grounds, viz :—

1st. That the agreement proved and the agreement set out in plaintiff's declaration were different, and there was a fatal variance.

2nd. No clause in agreement showing that the money or any part thereof claimed was to be returned, and the money became forfeited.

3rd. No sufficient evidence of payment to Vickery Davison.

I declined to non-suit the plaintiff. Defendants called no witnesses, and after addresses of counsel I told the jury that there was no question of the existence of the relationship of landlord and tenant, and the determination of this relationship by the defendants shortly after the notice of the 16th day of August, A. D. 1878;—in fact this did not appear to be questioned;—that the only fact to be submitted to them, as appeared by the addresses of counsel on both sides, was, did the plaintiff pay to old Mr. Davison, deceased, on the 12th day of December, A. D. 1874, the sum of five hundred and fifty-one dollars and thirty-six cents, as his counsel contended, or only the sum of three hundred and fifty-one dollars and thirty-six cents, as defendant's counsel alleged; or to put it in another way, did the plaintiff pay to defendant the sum of seven hundred and one dollars and thirty-six cents, as defendants alleged. I told them that if they believed the witnesses on behalf of plaintiff I thought the plaintiff was entitled to a verdict from them, for I could not conceive how defendants could determine the tenancy, take back the land in the agreement, and yet keep any portion of the money paid by plaintiff and not considered as rent; in fact it would be keeping land and money. But if they believed the view entertained by defendants and expressed by their counsel, that only the sum

of five hundred and fifty-one dollars and thirty-six cents in all had been paid by plaintiff, then I thought the defendant was entitled to a verdict, as they held the property long enough to exhaust the sum under the agreement in rent. As to whether there was a fatal variance between the agreement in proof and that set out in the declaration, or as to whether under the agreement the money would be forfeited, I told them they had nothing to do with these points. I had decided them on the motion for non-suit, and if I was wrong in the view I had taken my error could be rectified on an appeal to a superior tribunal. With these observations I read over the minutes of evidence very carefully to the jury, called their attention to the facts previously stated by me, and then left the facts above referred to entirely to them.

The jury then retired and, shortly after, returned with a verdict in favor of plaintiff for the sum of one hundred and sixty-one dollars and thirty-six cents.

J. J. Ritchie, for plaintiff.—The appeal is irregularly taken. There should have been a rule taken before the Judge to set aside the verdict, and from his decision on the rule the appeal should have been taken. County Court Act of 1880, section 57; *McPherson's Practice*, pp. 15, 16, 17.

Rigby, Q. C.—Section 57 does not apply. All that the section says is that instead of coming to this Court we *may* move the Judge below to set aside his judgment. We have the absolute right of appeal under section 99 if the Judge refuses such appeal. (McDONALD, J.—You are asking us to do what the statute gives the Judge himself power to do. SMITH, J.—You say you have two remedies.) Yes. (WEATHERBE, J.—Do you say you have an appeal on every point?) I have not gone that far, though the statute gives us every facility for reviewing the decisions of the Judge. (WEATHERBE, J.—You may then have a dozen appeals pending on interlocutory decisions, and the final judgment may be with you.)

J. J. Ritchie.—It is laid down in *Hilliard on New Trials*, 446, that the rule for a new trial should be taken before the Judge.

The point was noted, with leave to hand in any further cases.

Rigby, Q. C., in support of the appeal.—There is no such agreement proved as that declared upon. The agreement does not say the balance is to be repaid, and our contention is that it was to be forfeited. On this ground alone we are entitled to set the verdict aside. The agreement was to give a deed at the end of three years if the money was paid, and, if not, to appropriate the money paid, at a rate agreed upon, to the payment of rent. There was nothing said about the re-payment of any excess, and the balance would be forfeited. At any rate plaintiff would not be entitled without showing that he had given up possession. The Judge misdirected the jury in saying to them that if they believed the plaintiff's witnesses he thought plaintiff was entitled to a verdict.

J. J. Ritchie, contra.—The objection that we did not allege in our declaration that we had given up possession of the land, to be available, ought to have been taken below. The Judge gives the points taken, of which this was not one, shewing clearly that it was never thought of. There is no evidence reported of a demand of possession by the defendant, but it appears from what the Judge says that such a demand was made, and that the defendant went in under it. We cannot go into this, however. The jury have found it, and if they found it improperly there should have been a motion made below to set it aside. The ground of appeal as to misdirection is insufficient, because it does not specifically set forth in what particular the Judge misdirected the jury. As to evidence improperly received see *Taylor on Evidence*, 1681; *Williams* v. *Willcox*, 8 A. & E., 338. The declaration alleges that a certain amount was overpaid, and the jury find $161.36 This could not have been if possession had not been given up, and the verdict assumes it.

SMITH, J., now, (January 14th, 1882,) delivered the judgment of the Court:

This is an appeal from the County Court for district No. 5. The cause was tried, at the instance of the Judge of that Court, before a jury, to whom he submitted one fact, the result of which, was that under the instructions given them, they found a verdict for the plaintiff for the sum of one

hundred and sixty-one dollars and thirty-six cents, which the defendant seeks to disturb.

It is an action brought by the plaintiff on a bond, or agreement, given by one Vickery Davison in his life-time, of whom the defendants are the legal representatives. It is set out in this document that the plaintiff, Holmes, agreed to purchase from Davison a tract of land and premises therein described, situate at Parrsboro, in the County of Cumberland, for the sum of twelve hundred dollars, with interest as follows, that is to say: One year's interest on said sum in one year from the 1st March, 1871, the date of the bond; one year's interest on said sum in two year's from said date; and one year's interest, together with the principal sum of twelve hundred dollars, in three years from aforesaid date, according to the tenor of a note of hand of same date, made by the plaintiff, Holmes, to said Vickery Davidson, or order. It is also recited that plaintiff likewise indorsed to Davison, by way of collateral security, two promissory notes drawn by Francis Holmes and Hibbert Holmes in favor of plaintiff or order for $200 each, payable, one in two years from date of said bond with interest, and the other in three years from the 1st day of June then following. It is further specified that if default should at any time be made in the payment of the said interest annually, or in the payment of the said principal sum within the three years agreed upon, then the said plaintiff was to become a tenant under the said Davison, at the annual rent of seventy-two dollars, and that all payments made either by plaintiff on account of his own note, or by Francis and Hibbert Holmes on their notes so indorsed to Davison, should be in the first place applied to the interest or rent, as the case might be. Another part of the agreement states, (and I only refer to those portions of it out of which the questions of law and fact arose on the trial, and are now for our consideration,) that whatever sum or sums are paid on account of said indorsed notes being first applied as aforesaid, "the *remainder*" is to be applied to reducing the principal sum. And again, if default should happen in the prompt payments of the said twelve hundred dollars and interest as aforesaid, the said plaintiff was, at the termination of said three years, to deliver or cause to be delivered up to said Davison, or his representa-

tives, the quiet and peaceable possession of the premises, together with all improvements. If the agreement had stopped here I should have had no doubt of the legal construction to be put upon it in reference to carrying out the real intention of the parties to it as to the disposition of payments in excess of the yearly rental in consonance with honesty and common sense. But if an ambiguity or difficulty of construction could be imagined and a forfeiture of moneys then paid be successfully urged, the further language renders, to my mind, such a position untenable. It adds that in the event of the surrendering up the premises at the end of the three years, as above mentioned, "all payments made in that case being applied towards rent, at the *rate aforesaid*, and the said note, and the said indorsed notes, shall be given up by the said Vickery Davison, or his legal representatives, without any recourse upon the said Vickery Davison, his heirs and assigns." Here, it seems to me, is a clear and unmistakable indication of what was really the intention of these parties as to what was respectively to be done by each on the termination of the tenancy, and when the property was to be delivered up to Davison. How were moneys then paid by plaintiff to Davison to be applied and disposed of by this very language? Why, to "be *applied towards rent at the rate aforesaid.*" Not a word about any sums paid in excess of this to be forfeited in the event of a restoration of the premises *with improvements* to Davison. He says substantially to plaintiff: "I will sell you a certain property for so much money, payable in a way and times agreed on. In default of your fulfilling the terms of sale, you can remain on the property no longer under the terms of our contract, but as my tenant, at a fixed annual rental of seventy-two dollars, with the further understanding that you return the property at the expiration of three years." It could never be intended that if the plaintiff had paid $1100, together with the yearly rental he would be compelled to lose this amount, land and improvements and all. Lord ELLENBOROUGH observes: "The object of all rules of interpretation, of course, is to ascertain the true meaning of the parties to a contract, which is to be gathered from a careful consideration of all the surrounding circumstances, as well as of the words used by the contracting parties as the vehicle of their intention,

and DALLAS, C. J., in *Solly* v. *Forbes*, 4 Moore, 463, says: "If a deed can operate in two ways, one consistent with the intent, and the other repugnant to it, Courts will ever be astute so to construe it as to give effect to the intent, and the construction must be made on the entire deed." In *Parkhurst* v. *Smith*, Willes, 332, the principle is thus recognized: "Too much regard is not to be had to the natural and proper signification of words and sentences, for the law doth often transpose words contrary to their order to bring them to the intent of the parties." In short, is the language so strong and positive that the Court are absolutely bound to put the construction upon the contract for which the defendant contends? I would be most unwilling to come to this conclusion in the case under consideration.

Entertaining the view I do with reference to plaintiff's right to recover under the contract from the defendants the sum paid in excess of that consumed in rent, and the jury having passed on the amount paid to Davison, as put to them by the learned Judge below, I do not think the legal objections raised at the trial and argument can prevail to disturb the verdict, and I think that the appeal must be dismissed.

WEATHERBE, J.—My learned brother has delivered the judgment of the Court. There was an objection taken that there was a variance between the declaration and the agreement, and that there was no delivery of the land before the return of the money, and I cannot see why either one of these grounds should not prevail. Of course I am alone in that view.

McCORMACK *v.* DENNISON.

(Before McDONALD, SMITH, JAMES and WEATHERBE, JJ.)

(Decided January 14th, 1882.)

Right of way.—Excess.—Removal of gate.—Prior registry.—Proof of certificate.—Variance.—Gould *v.* McGregor, *1 R. & G.*, 339, *followed.*

To an action of trespass defendant pleaded, justifying under an alleged grant of a right of way. Plaintiff replied excess, and proved that a gate on the property had been removed and torn down in the exercise of the alleged right of way. Plaintiff and defendant both claimed their adjoining lots by conveyance from the same grantor, and defendant relied on the fact that his deed, which comprised the grant of the right of way over plaintiff's land, had been registered long previously to the registry of plaintiff's deed, but no evidence was given as to the registry or the date thereof.

Held, per JAMES, J., that under the decision in *Gould* v. *McGregor*, 1 R. & G., 339, the certificate should have been tendered, and proved if objected to, and further, that plaintiff was entitled, under the evidence, to hold his verdict on the ground of excess.

Per WEATHERBE, J., that the *locus* of the trespass had not been identified by defendant with the way as described in his deed.

McDONALD, J., dissenting.

This was an action for trespass to land. Defendant justified under a right of way, to which plaintiff replied excess. A verdict was taken for plaintiff by consent for one dollar, subject to the opinion of the Court, and a rule granted to set the verdict aside.

Plaintiff and defendant both derived title to their lots, which adjoined each other, from one Farnsworth, plaintiff claiming by deed from Farnsworth to R. McCormack, and R. McCormack to himself, made respectively in 1873 and 1876, but neither of which was recorded until 1879. Defendant claimed under a deed from Farnsworth to J. Cox, and from Cox to himself. As a matter of fact, both these deeds had been recorded, one in 1874, and the other in 1875, but no evidence was tendered or received at the trial as to the registry or the date of registry. The deed of plaintiff's lot contained a reservation of a right of way twenty-four feet in width along the Randolph line for the use of a brickyard only, from the main post road to the lot of land sold and conveyed to John Cox and others. Defendant's deed included a right of way along the east line adjoining the Fitzrandolph land to the Annapolis road, so long as no other public road and right of way is available to the said John Cox, and no longer. There was no evidence given to identify the way claimed with the

Randolph line. The certificate of registry of defendant's deed was admitted at the trial without objection. The act relied on by the plaintiff as being in excess of the right conferred on the defendant was the removal and tearing down of a gate on the property.

Rigby, Q. C., for rule.—There is no excess pleaded to the fifth and tenth pleas, which allege a public way. If a lesser way is proved under these pleas than is alleged, we are entitled to a verdict. We also take the ground that the plea of excess is not sufficient, but it should have been alleged that the defendant's right to use the way was limited by the plaintiff's right to erect and maintain gates in the removal of which the excess is alleged to consist. It is important to keep in view that this is a right of way created by grant as against a right of way created by prescription. In the latter case you must look to the right as it has always existed. In the former case you must look to the grant. It is a case of construction. If the defendant can put up one fence he may put up an indefinite number. *Gale on Easements*, 570. The owner of the dominant estate cannot impose additional burdens upon the servient estate. If a man grants a right of way with a fence across it, he may maintain the fence, though the fence would appear to be inconsistent with the right. It does not appear that there was a fence there at the time, but if there was a fence a gate cannot be substituted. *6 C. & P.*, 391. (WEATHERBE, J.—All that case shows is that you must not obstruct the way.) *Sir W. Jones' Reps.*, 221; *Rolle's Abridgt.* "*Nuisance, T;*" *Gale*, 640; *Welsh* v. *Willcox*, 101 Mass., 162. The right of way granted was all that was necessary for the use of the brickyard. (WEATHERBE, J.—Your deed does not refer to the brickyard at all. It is simply a right of way to your lot. *L. R., 10 Ch.*, 586.) Chapter *79 R. S.*, section 19. The defendant first registered his deed, and as against him previous deeds unregistered are void. *Law Dictionary*, title, "Way." See also *Bouvier*.

Harrington, Q. C., contra.—*Washburne on Easements*, marginal paging 195, lays down the principle. The principle there is that the owner of the easement is entitled to its use, doing as little prejudice as possible to the fee simple. If an open

way free from gates is intended, it must be so expressed. See also *Addison on Torts*, 148. The parties must be held to have contracted in view of the *status quo* of the land at the time. *21 Grant's Chancery Reports*, 263. When the deed was given there was reserved to us the fullest enjoyment of our property consistent with the right granted. It must have been intended that we should have a gate, as otherwise we would be deprived of the use of a valuable pasture. The cases are very numerous in which parties are permitted to place gates across private ways. *42 Upper Canada Q. B.*, 274. The right of way was in existence a year previous to the grant of the brickyard. The same principle which respects the condition of the way at the time will respect the condition of the land. The registry could give no more than a right of way for the use of the brickyard. As to the condition of the land, see *Underwood* v. *Carey*, 1 Cush., 285, 292. The case reported in 42 L. T. Rep., Ch. Div., 580, illustrates the same point, deciding for the first time that where the owner of a close grants all the land surrounding it he impliedly reserves a way to the close, but adapted to its then condition. *Waterman on Trespass*, vol. 2, pp. 206, 207; *L. R. 2 C. P.*, 580; *8 Exch.*, 187. The owner retains all the rights consistent with the easement, and to enjoy these it was necessary to maintain a gate. *Bartlett* v. *Pratt*, Thomson, 11, shows that there may even be a right to maintain a gate across a public way.

Rigby, Q.C.—We don't controvert the principle laid down in *Grant's Chancery Reports*.

The COURT, (January 14th, 1882,) delivered judgment:—

WEATHERBE, J.—This is an action of trespass to land. The eighth plea is relied on as alleging a justification, as follows:—

"8. And for an eighth plea to the said plaintiff's writ and declaration, the defendant says that at the time of the alleged trespasses he was seised and possessed of a lot of land adjoining the plaintiff's, and long before the alleged trespasses; and that Nelson Farnsworth was formerly the owner of the said lot of land now owned and in the possession of the said defendant, and who also at the same time was the owner, and

in possession, of the said lot of land now in the possession of the plaintiff; that the said Nelson Farnsworth, in 1872, by an agreement in writing, bargained and sold to John L. Cox and others the said lot of land now owned by the defendant, with a right of way over the lot of land now in the possession of the plaintiff, being then the owner of both of the said lots, along the east line adjoining Fitzrandolph's land to the Annapolis road, so long as no other public road or right of way was available to the said John L. Cox and others, and no longer; and the said Nelson Farnsworth subsequently, and according to the terms and conditions of the said agreement, conveyed by deed the said lot of land with the said right of way to the said defendant, and that the alleged trespasses were a use by the defendant of the said way, and that there is no other public road or right of way available to the said defendant since the execution and date of the said agreement between the said Nelson Farnsworth and the said John L. Cox and others."

On the trial a verdict was taken by consent for plaintiff for one dollar, with power to the Court to set it aside.

Plaintiff and defendant both derive title from Nelson Farnsworth, from whom a deed to Richard McCormack, dated December 20th, 1873, was read on the trial. The plaintiff also put in a deed from Richard McCormack to himself, dated May 7th, 1876. Defendant put in a deed from Farnsworth to one Cox, dated August 6th, 1874, of land said to adjoin that of plaintiff, and a deed of the same land, dated January 20th, 1875, from Cox to defendant. There was a certificate of registry of the deed from Richard McCormack to plaintiff, dated April 16th, 1879, read without objection. I understand the defendant relies on the prior registry of his deeds, but that is unimportant in the view I take of this case. However, *Gould* v. *McGregor*, (1 R. & G., 339,) is conclusive in favor of plaintiff to show if prior registry is relied on the certificate must be tendered, and if objected to, proved according to the statute. I think it likely this point escaped observation on the trial.

There is another question. I do not very well see how the defendant could relieve himself from the variance between the right of way granted to him in his deed and the right of

way set out in his plea. It appears to me, also, that there is no evidence whatever to show where the Fitzrandolph land is, or in other words, the defendant has not identified the right of way described in his deed with the place on plaintiff's land where the alleged acts which he is required affirmatively to justify were committed.

While referring to the absence of all reference in the evidence, including the plan, to the Fitzrandolph land, it is proper to refer to the language of the description of the way granted to the defendant in his deed. At the close of the description of his own land are these words; "And also a right of way along the east line joining the Fitzrandolph land to the Annapolis road, so long as no other public road and right of way is available to the said John L. Cox, and no longer." There is nothing here to show on which side of the east line joining the Fitzrandolph land the easement is to be enforced against the plaintiff, if at all. We must take the evidence as it is furnished to us, and there is nothing, as I have said, to show where this right of way is to be found. It is not necessary for us to say under what circumstances, if at all, the defendant could supply evidence to shew on which side of the east line the way was intended to be granted, when that is not mentioned in the deed itself. And we offer no opinion as to whether, if defendant had established prior registry and properly pleaded, he could be permitted to furnish the necessary evidence, even if the facts existed to establish a right of way across the plaintiff's land.

I do not understand that we are not bound to administer the law upon the pleadings and evidence before us, as we ourselves view the evidence with the verdict and the application of the law to the case, irrespective altogether of the particular mode by which counsel may conduct an argument. And I would have supposed it was clear that we cannot attach the weight of legal testimony to so important a document as a certificate of registry of a deed, which often is in effect the deed itself, merely because one of the counsel has entered a short memorandum with a date, purporting to be the date of a certificate of registry, among the papers, or that we should give any weight at all to such memorandum or take any notice of it when nothing appears in the evidence.

One certificate was received, it would appear from the notes, without objection. I suppose, as it seems prior registry was relied on, that if the other certificates were tendered there would have been an application to correct the notes if incorrect. I should regret if the case turned on this, and it is satisfactory that a majority of the Court uphold the verdict irrespective of this question. Even if the defendant was free of these difficulties, there is a replication of excess, and I think if he had no right, and he claims none, to tear down the gate in question from its position and break it, but only the right, as he asserts, to open or remove it, so as to prevent the obstruction of his way, the evidence is sufficient to support the replication as pleaded. It is in proof that the fence which defendant requires the plaintiff to remove and keep removed entirely from the alleged way has been in existence continuously for forty years, and plaintiff's counsel argues that under any view of the case defendant requires more than the law imposes on the plaintiff. As it is unnecessary for us to say what view we take of this contention, I abstain from offering an opinion on the point.

For the reasons mentioned, the rule *nisi* for a new trial, we are of opinion, should be discharged with costs.

JAMES, J.—I think every Judge prefers, if possible, to decide every case upon its substantial legal merits. For my own part I am always reluctant to decide a case upon technical grounds, especially when not presented by counsel at the argument. Nevertheless, I feel bound to give effect to such objections whenever presented, if they are well founded. In this case I cannot think that the defendant has shewn that his deed, under which he has pleaded a justification, and which was dated long after that of plaintiff, was recorded before it, because no evdience was tendered or received at the trial as to the registry or the date of the registry. I think the case of *Gould* v. *McGregor*, 1 R. & G., 339, fully sustains this point.

The other ground on which I must sustain the verdict is that I think there is evidence sufficient to sustain a jury in finding that the defendant, on several occasions, not only opened, but tore down the plaintiff's gates, and that he did so

persistently and unreasonably. He was justified in opening them if he found them shut, and in leaving them open, but not, I think, in destroying them. It is true the excess of damage in what he did beyond what he had a legal right to do was very small in each case, but the verdict is only for one dollar, and it could not very well be much less. He acted in a high-handed and unreasonable manner, and I think ought to be held strictly responsible if he exceeded in the slightest degree his legal right. This, I think, is not a mere technical objection, but one founded in reason and justice, and now embodied in the pleadings. I think the verdict ought to be sustained on these two grounds.

There are other questions in the case to which I do not think it necessary to refer.

SMITH, J., concurred in the judgment of WEATHERBE, J.

MCDONALD, J., read the following dissenting opinion :—

It appears from the evidence that Nelson Farnsworth was the proprietor of a lot of land at Annapolis, and that, on the 20th day of December, 1873, he deeded a part of it to Richard S. McCormack, "reserving a right of way 20 feet in width along the Randolph line, for the use of the brickyard only, from the main post road to the lot of land sold and conveyed by Nelson Farnsworth and Rachael, his wife, to John Cox, John H. Hill, and Joseph Fitzrandolph." On the same day the grantee, Richard McCormack, deeded the same piece of land to the plaintiff, with the same reservation, but neither deed was registered till the 16th day of April, 1879. On the 6th day of August, 1874, the same grantor, Farnsworth, deeded another piece of his land to John L. Cox, "and also a right of way along the east line adjoining the Fitzrandolph land to the Annapolis road, so long as no other public road and right of way is available to the said John L. Cox, and no longer." This deed was registered on the seventeenth day of September, 1874, and on the 20th day of January, 1875, Cox deeded the same to the defendant, with the same right of way as was granted to him. The latter deed was registered on the 29th day of January, 1875,—over four years before the registry of the deeds to the McCormacks. Inasmuch as the deeds under

which the plaintiff claims were not registered at the time the defendant received and registered his deed, he, (the defendant,) had his right of way from Farnsworth before the plaintiff had any legal title whatever, as against the defendant, and would, as I think, have been entitled to the way under Farnsworth's deed, whether the reservation had or had not been made in the deed to McCormack which was then existing but not registered,—there being no evidence that the defendant was then aware of its existence. Therefore at the time Farnsworth executed the deed to Cox he was the legal owner of the soil in fee simple so far as the defendant is concerned, and the last deed was the first to become effective as between the parties to this suit. The plaintiff placed three gates upon the way, and the defendant, as the evidence shews, having pulled down one of them, for which latter act this action is brought, it may fairly be contended that instead of the plaintiff having a right of action against the defendant for pulling down one of the gates, the latter has a right of action against the former for placing them where he did. It was contended that, as there was a fence across the way at the time of the grant to the defendant, the plaintiff, claiming under Farnsworth, had a legal right to keep obstructions on the way wherever and whenever he pleased, and as many as he desired; and some authorities were referred to in order to support that contention. I have examined the cases, and am of opinion that they do not support the contention at all, and they certainly have no application whatever in a case like this, in which there was no right of way used, as a way, until it was granted by Farnsworth's deed to the defendant, although I think that it is undoubtedly true that where there is an existing right of way over lands, and where it is used as an easement at the time of the grant, the nature of its enjoyment, at that time, is the proper measure of its enjoyment during the continuance of the grant. *Steward* v. *Jackson*, 21 Grant's Ch. Rep., U. C., 263; *Vansickle* v. *Kelly*, 42 U. C. Q. B., 274; *Mayor of London* v. *Riggs*, 42 L. T. R., 580.

It would be absurd to hold that, if one grants a right of way over his land through a thick forest, which way it would be impossible to use as intended by the grantor without removing trees or other obstacles in the way, he could

afterwards recover damages against the grantee for doing that without which the grant would be nugatory. But to my mind it is equally absurd to hold that if one grants a right of way to another over his land, without stipulating that it should be a pent way, he should afterwards be at liberty to place as many gates and bars on the road as he pleases, and whenever and wherever he pleases. The plaintiff cannot successfully claim more than his grantor, (Farnsworth,) gave him, and, even if his deed from Farnsworth had undertaken to confer the right claimed, which it did not, he could not have now exercised it, because the defendant's deeds, without any reservation as to gates, bars or fences being placed upon the way, had been registered before the plaintiff's deeds, as already noticed. "Every deed must be taken most strongly against the grantor." *3 Kent's Com.*, 514. Again, (same page), "The general rule is that when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use." The grant to the defendant of the way in question reserves no right whatever to encumber it in any way, and does not even limit it, as it was reserved in Farnsworth's deed to McCormacks, "for the use of the brick-yard only;" and I do not think that we are at liberty to attach to the deed any qualification or restriction which the grantor himself does not wish or omitted to express. I am therefore of opinion that the defendant was justified in removing the gate, provided he did no more injury to the plaintiff's property than was necessary for that purpose. But in answer to the defendant's pleas of justification on that ground the plaintiff replies that the defendant committed trespasses in excess of the alleged right, and if there is no evidence to support such replication, the verdict which was entered by consent for one dollar in favor of the plaintiffs must be set aside.

The evidence on the part of the plaintiff would have been sufficient if the bare opening of the gate and leaving it open would have been such an excess as is pleaded, but, if I am correct in coming to the conclusion that he had no right to place it there at all, and that the defendant was justified in removing it altogether, then the question is, was the latter guilty of trespass in exercising his right to remove it? The

plaintiff says that the defendant informed him that he told his man to cut the gate down if he found it closed, but the gate was not cut down. Again he says he "saw Dennison go down, and no other, and a few minutes afterwards the gate was down, and no other person could have done it." This was between the 27th of June and the 26th of July. On that day, the 27th June, Samuel Fitzrandolph saw Dennison tear down the middle gate, but he adds; "I don't know of any injury to the gate;" and the plaintiff himself does not say that any injury was done on any occasion on which he saw plaintiff remove the gate, beyond the removal itself. Frederick McCormack, plaintiff's son, says; "I have frequently seen the middle gate torn down between the 27th of June and the 26th of July by Dr. Dennison and his men. The gate was set in a socket, with an iron band at the hinge side, and there was a hook and staple. The gate was thrown on the ground. The band was broken. I used to fix the gate up when I found it down. It was every other day taken off in this way." If the hinge and the band were broken on the 27th of June, which was the only day on which the defendant was *seen* tear it down, it is not easy to understand how it could be kept up after that to the 26th of July, according to Frederick, who says, referring to that period; "I used to fix the gate up when I found it down. It was every other day taken off in that way." The plaintiff says; "The hinges were broke and the gate kept off." Probably it could not be well kept on after the hinges were broken. It is worthy of remark that, although this witness, (Frederick,) says on his direct examination that he frequently saw the gate torn down by the defendant and his men during that time, he says on cross-examination; "I can't say that I saw Dennison himself take down the gate." If, as he says, he saw it done frequently, it was an easy matter to ascertain whether or not those who did the work acted at the instance of the defendant. He does not even say who the parties were, or that the defendant was present. Obed Mitchell was a servant of the defendant, who told him to leave the gate open. He says; "He offered me an axe to cut it down;" but there is no evidence that it was so cut down. Mere direction, unless acted upon, will not constitute a trespass, and I have no doubt the truth is that it

was not carried into effect. This is the evidence of excess produced on the part of the plaintiff, and its weakness must be admitted, even if uncontradicted.

Then, on the part of the defendant, we have his own evidence, in which he says; "I removed the middle gate. I did not break it. I left it open and put a stick against it. I took it off a little while before the action and threw it beside the fence." And then he says; "I opened the gate because it was in my way, and left it open. When I left it off the hinges I was going to shew a man about brick. I did not break the gate to my knowledge." He further says that his property has the brickyard on it; but in the view I take of this case, I think that fact is unimportant. The only injury to the gate,—in fact, the only thing that can be urged as excess,—is the breaking of the hinge and band; and the defendant, without any contradiction, says, first, that he did not injure the gate, and again, on cross-examination, that he did not do so to his knowledge. If he did it he must have known it, and therefore I assume that he did not do it personally. What he told the witness, Mitchell, to do was not done, and he is not responsible for anything that may have been done without his authority. I have some doubt as to whether or not the evidence sufficiently shews that, in order to remove the gate and keep it removed, it was not necessary to remove the hinge and band; but it is not necessary to decide the case on that point. I am of opinion that the verdict must be set aside with costs.

If the objection had been taken, either at the trial on a motion for nonsuit, or at the argument, that the certificate of registry had not been sufficiently proved, I would most undoubtedly hold that the evidence of prior registry was not sufficient, as we held in the case of *Gould* v. *McGregor*, 1 R. & G., 339, in which case the objection was taken both at the trial, on a motion for nonsuit, and at the agument. Here no such objection was taken at any time, but, on the contrary, we had submitted to us unquestioned at the argument the printed evidence of facts upon which to base our decision, shewing the prior registry of the defendant's title. As the correctness of that evidence was not questioned either at the trial or at the argument of this case,—differing in

that respect from the case of *Gould* v. *McGregor*,—I take it that counsel on both sides admitted its correctness. If at the trial the evidence had been objected to, it would have been the clear duty of the learned Judge who presided to have rejected it, and that fact would have been no doubt noted upon his minutes. And if at the argument the objection was raised that the printed case submitted to us was not correct, we would have ascertained that fact; but as it is, I regard it as having been admitted by counsel on both sides to be correct.

EMBREE *v.* NOILES.

(Before DESBARRES, MCDONALD, SMITH, JAMES and WEATHERBE, JJ.)

(Decided January 11th, 1882.)

Pleading in trespass.—Denial of Plaintiff's possession.—Sufficiency of plea that the land is not plaintiff's as alleged.

To an action of trespass to land defendant pleaded among other pleas, that the land was not plaintiff's as alleged. The verdict was for plaintiff.

Held, by MCDONALD, C. J. and WEATHERBE, J., that the plaintiff's possession was put in issue by the plea.

By MCDONALD and JAMES, JJ., that the possession should have been specifically denied, and the plea was not sufficient.

The Court being equally divided on the rule for new trial, the rule dropped.

This was an action of trespass, tried at Truro, in June, 1879, before Mr. Justice WEATHERBE. A verdict was found for plaintiff for $4, and a rule *nisi* granted to set it aside. The rule was first argued March 5th, 1880, before MCDONALD, SMITH, JAMES and WEATHERBE, JJ.

The action was trespass to land with counts for trover and conversion of goods. Defendant pleaded to the trespass counts:

1. Denial.
2. That the said land was not the plaintiff's as alleged.
3. That the plaintiff was not entitled to the possession.
4. *Liberum tenementum.**

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* The decision turned wholly on the question of pleading and it is not considered necessary to prepare a statement of the facts of the case. The argument as to the facts is inserted only because it could not well be disentangled from the argument on the pleadings.

Rigby, Q. C., for plaintiff, takes the objection that the defendant has not by his pleas raised an issue as to plaintiff's possession, citing *Churchwardens* v. *Vaughan*, 2 R. & C., 348.

Meagher.—This point was not taken at the trial. Our plea that the land is defendant's raises a sufficient issue, being denied by plaintiff. *L. R. 7 Q. B.* 534, shews that the Judge at the trial is bound to try such issues as are raised by the pleadings on the record. An amendment may be made at the argument. *Day's Common Law Procedure Act*, section 222.

WEATHERBE, J.—The question with me is whether denying that the land was the plaintiff's land is not denying his possession. If he is a trespasser and you have denied his right of possession, it is a question whether you have not complied with the statute.

Rigby, Q. C.—The English statute differs from our Practice Act. Clauses 192 and 193, are not in the English Act. Both these clauses seem to shew that the amendment is to be made before or at the trial. Amendments are not as of course. They appeal to the discretion of the Judge, who must decide whether they are meritorious or not, and the Judge at *nisi prius*, having the facts before him, is the proper person to decide. The title and right to possession are not settled by these pleas. It may be true that the defendant has the legal title, and yet the plaintiff may be entitled to maintain his action. Defendant's title is no answer to an action of trespass.

(WEATHERBE, J.—But he would not be entitled to recover if he had no possession and title appeared to be in the defendant.) Here the possesson is admitted by there being no plea denying it. (Cites *Day*, 216, as to the discretion of the Court in case of amendment.) It is a discretion to be exercised on the facts of the particular case. The application is not made within a reasonable time. *Wood* v. *Grimmer*, 10 B. & C., 689.

Meagher cited *Bigelow on Estoppel*, 26 ; *40 U. C. Q. B.*, 611 ; *13 M. & W.*, 215.

Rigby, Q. C., cited *Bigelow*, 25, 26, as to estoppel.

The Court being equally divided on the question as to the pleadings on this argument, no judgment was given, but the cause was ordered to be re-argued. The second argument was held before DESBARRES, MCDONALD, SMITH, JAMES and WEATHERBE, JJ., March 11th, 1881.

Graham, in support of rule.—If a party claims under a deed, possession of a part is possession of the whole, but there is nothing to shew that the plaintiff's deed includes this *locus* at all. Where a party claims by mere possession he must do so by certain and well defined boundaries. Plaintiff has no title to or possession of the *locus*. He has been out of possession for longer than the statutable period. There is no evidence where the 100 acre lots are or where the Cobequid road is, which are referred to in the description. There is no evidence to show where the intervale is.

Rigby, Q. C., was called upon by the Court.—We have three boundary lines fixed, on one side the Bacon line, on another the Samuel Stewart line, and on a third the Cobequid Hill Road lots. On the fourth side we have a line admitted by the defendant as his southern and our northern boundary. In *Hosterman* v. *Hosterman*, (not reported,) where the metes and bounds in the description in the deed did not enclose any land, the Court allowed parol evidence to be given. *Taylor on Evidence*, p. 996, sec. 1194; also sections 1224 and 1226. There is no plea denying the plaintiff's actual possession. *Grotto* v. *Farish*, Thomson's Rep., 221; *Churchwardens* v. *Vaughan*, 2 R. & C., 438. In the latter case the plaintiffs never had any actual possession. The plea denying the plaintiff's property is not sufficient, for one party may have the possession and another the property. Neither is it sufficient to deny that the plaintiff is entitled to possession, for a party may have possession, though he be not entitled to it and may maintain trespass. A verdict will not be set aside for misdirection unless the jury have been influenced. *1 N. & M.*, 598; *4 Bing*, 483.

C. J. Townshend.—We were not allowed to show where the Cobequid Road lots were, except by producing deeds which do not exist. The survey was a hundred years old. What we proved was a base line upon which a number of

lots known as the Cobequid Road lots were cornered. (WEATHERBE, J.—You would not have had the only evidence that may save you if I had not pointed out the insufficiency of the evidence produced.) There never had been any dipute about the locality of this lot. The deed under which Noiles claimed, if correct, would have run right up to Stewart's line and taken the whole line, embracing everything contained in our deed. We had a great deal of evidence, which was refused, to show that Samuel Stewart's name had been substituted by mistake for that of John Stewart. The defendant's father distinctly admitted the line between the parties. (WEATHERBE, J.—Your only difficulty is to show that the boundaries of your deed embrace this land with that occupied.) I am coming to that. We have evidence showing the base line of the Cobequid Hill Road lots. Duncan, the surveyor, speaking, it is to be presumed, from experience, alludes to the line called the base line of the Cobequid lots. He knows it as that line, and the jury have believed him. (WEATHERBE, J.—There is nothing in the deed about a base line.) There is something about the rear line, and it is the same thing. It is undisputed that this is the base line, and all I need to do is to show that there was evidence from which the jury could locate the land. The land was bounded on the west by Bacon's land. There is enough evidence as to where that is. The evidence is that Bacon lived west of the west line on the plan. (WEATHERBE, J.—Is it enough to prove where Bacon lived? Must you not prove his land?) I don't think we are bound to prove the titles of all the people around. I think we need only prove that he lived on the adjoining land. (WEATHERBE, J.—You have proved that Bacon lived half a mile away, and only occupied a few acres.) That merely refers to his clearing. (WEATHERBE, J.—If you can prove Bacon's line all else would go.) There is evidence of Bacon's line; evidence enough, at all events, to go to a jury. The northern boundary, I think, is most conclusively fixed. It is by Keever and Ed. Noiles' land. We know where Noiles' land is. The brother of defendant says his father lived on the lot north of the lot in dispute. Evidence may be given of admissions in disparagement of title. *Taylor on Evidence*, vol. 1, sec. 684.

Graham, in reply.—The question of the plea is not a very serious matter, and is not one that the Court would favor. In the appeal Court it could be easily remedied. This is not the case of the *Churchwardens* v. *Vaughan*, (2 R. & C., 438.) We have an informal plea on the record. The plea is that the party was not in possession of said land, instead of what it should be, (for I don't know what it should be under the case of *Churchwardens* v. *Vaughan*.) I think, in order to be logical, if the writ says that the plaintiff was possessed, then the plea would say that he was not possessed, but when the writ is for a trespass upon lands of the plaintiff, the logical plea is that the land was not the land of the plaintiff. There is no allegation here in the writ that the land was in the possession of the plaintiff. The point not having been taken at the trial, cannot be taken here. *Haliburton* v. *Molloy*, James, 246; *15 C. B.*, 477; *5 E. & B.*, 263. The American doctrine, as we may call it, adopted in *Cunard* v. *Irvine*, James, 31, has been much modified. It was that a party having possession of a piece of intervale had possession co-extensive with the boundaries of his deed if there were no adverse possession. But the metes and bounds in the deed must be specific. It must not be dug out with a great deal of effort. The recorded deed in the United States was notice that, though the party was not in possession of the whole, he claimed by specific metes and bounds. It was a very good doctrine to adopt. But where two persons give deeds of the same ground, one must give way. I would be precluded from saying a word if the descriptions were specific. *Angell on Limitations*, 440. Where one piece of wilderness land is bounded by another piece of wilderness, and there is no reference to stakes or lines in the deed, it is certainly not within *Cunard* v. *Irvine*. There is a line mentioned in the last deed, but it commences nowhere. *2 Pugsley*, 233; *Angell on Limitations*, 430; *5 Allen's (N. B.) Reps.*, 59. In the New Brunswick cases the Judges have been limiting and restricting the doctrine that possession of the part gives possession of the whole as far as possible. Chief Justice CARTER said that the reasons given by Chief Justice HALIBURTON were not such as to carry conviction to his mind, and that it was not called for by the circumstances of the case. (DESBARRES, J.—It is only the opinion of one Chief

Justice against another. We are bound by *Cunard* v. *Irvine*.) The citation from *Angell on Limitations*, 430, shews that where one party goes in under color of title and another subsequently makes a similar claim, the first party will hold to the exclusion of the second.

The COURT, now, (January 14th, 1882,) delivered judgment:—

WEATHERBE, J.—The first and second counts of the declaration are for breaking and entering plaintiff's land, etc. The defendant, Noiles, pleaded to these counts,

First. A denial of the acts complained of.

Second. That the said land was not the plaintiff's, as alleged.

Third. That the plaintiff was not entitled to the possession of said land.

Fourth. *Liberum tenementum.*

Plaintiff had a verdict, and on argument of a rule *nisi* to set it aside it was contended by plaintiff's counsel that, assuming plaintiff has failed to prove legal title to the land, which I think he has not made out, the defendant being a mere wrong-doer, and not having traversed the plaintiff's possession, that possession must be taken to be admitted, and the verdict therefore should stand. Our statute law respecting pleading to such actions as this is copied substantially from the English rules of 1852 and 1853 which abolished general issues in the sense in which the term was used previous to *4 William IV.* Section 145 of cap. 94 of our statutes, providing for pleading to actions for trespass to land, is copied substantially, and that part of it now in question literally, from the English rule. The English rule is as follows;—"In actions for trespass to land the plea of not guilty *operates as a denial that the defendant committed the trespass alleged, in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which if intended to be denied, must be traversed specifically.*" Section 145 of our statute reads thus;—"In actions for trespass to land a plea that the defendant did not commit the trespass complained of shall *operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not*

as a denial of the plaintiff's possession or right of possession of that place, which if intended to be denied must be traversed specially." It must be apparent that these are the only words of the English rules and our Act which are in the slightest degree involved in the discussion of this question. The authorities under the English rule, containing the very same words which our Legislature has adopted, are, I should say, the proper guide for us, whatever may be our views of the rules themselves or the authorities; and we know, moreover, that the rules were drawn by very learned persons. These words formed the subject in England for several years of much controversy. This question now before us, namely, whether the plea denying that the land is the land of the plaintiff, as alleged, traverses the plaintiff's possession, never was doubted or questioned in England, and but for a controversy on a different question, arising out of words to be found in this section 145, we would have no English authority of which I am aware directly on the interpretation of these words. That controversy, however, has called forth from the great legal minds engaged in it, both on the Bench and at the Bar, language which, I must say with all deference, causes me surprise that the question was ever raised here, or once being raised, that it was not set at rest with a result the reverse of that which we have to meet. *Heath* v. *Millward*, 2 Bing. N. C., 98, was argued in the Queen's Bench the next year after the new rules. The action was trespass for breaking and entering plaintiff's close, and the pleas were, 1st, not guilty; 2nd, that the close was not the close of plaintiff; and 3rd, *liberum tenementum*. There was a verdict on the second issue for defendant, possession being proved in plaintiff, with leave to move to enter it for plaintiff, property being found in neither plaintiff nor defendant.

The argument of plaintiff's counsel was that the second plea put in issue *only the possession* of plaintiff, and not his title. Defendant's counsel argued that this plea put in issue the plaintiff's property, and contended that he should have proved property. TINDAL, C. J., said; "I think that the second plea, on which the whole enquiry arises, was intended to deny the plaintiff's possession of the close in dispute." Here it was assumed on all sides what is now in dispute. *Browne*

v. *Dawson*, 12 Ad. & Ell., 624, also in the Queen's Bench, is to the same effect. *Purnell* v. *Young*, 3 M. & W., 288, was decided in the Exchequer Court in 1838. Hitherto it had been held that the plea in question put in issue *no more* than the question of possession. PARKE, B., said, in referring to the decision of TINDAL, C. J.; "But the plea denying the close to be the plaintiff's, since the new rules, is a denial of the plaintiff's title to the close to the same extent that he would have been obliged to prove it under the general issue, that is, it is a denial of possession if the defendant was a wrong-doer, if otherwise, of the right to the possession." And he added; "But on either supposition it is necessarily a denial of title, for even in the former case possession is title against a wrong-doer, and therefore the plea raises a question of title in the action." Lord Chief Justice TINDAL was of opinion that the plea that the close was not the plaintiff's traversed *only the possession*, and he said he saw no reason, if defendant wished to traverse his *title*, why he should not allege that the close is not in the plaintiff's possession or is not the plaintiff's property. In 1840, in *Brown* v. *Dawson*, the question was raised under the new rule in trespass for breaking and entering a room. Pleas were 1st, not guilty, and 2nd, that the said room was not the room of plaintiff. Lord DENMAN, in giving judgment, on the authority of *Heath* v. *Milward*, *(supra,)* calls the second plea *a plea of possession*. He said; "We agree that the question of title is not to be raised on a plea of possession."

Then in 1843 came the case of *Whittington* v. *Boall*, 5 Q. B., 139, establishing that,—to use the words of the reporter's head note,—"in trespass *quare clausum fregit*, if issue be joined on a plea that the close was not the property of the plaintiff in manner, etc., the plaintiff's case is established if he proves possession; and the defendant cannot, on such pleadings, offer evidence of title in himself." The action was trespass in breaking and entering plaintiff's orchard, and taking apples from the trees. There were only two pleas, 1st, not guilty, and 2nd, that the said close, trees, apples and fruit "were not the property of the plaintiff in manner and form, etc." It was admitted all round that this plea was "a denial of the plaintiff's possession," which was required by the new rules, as by our section 145, to "be traversed specially."

There was a verdict for plaintiff under the direction "that as the case stood possession would be the evidence of title, and would decide the question of property, and that the jury had nothing to do with the right of the lord and the copyholders, but that he who was in possession was the proprietor till some one appeared who had a better title." It was contended that this was misdirection. The language of PARKE, B., in the Exchequer Court, in deciding *Purnell* v. *Young*, already mentioned, was relied on in support of the argument that the second plea raised the issue whether plaintiff or defendant had the better title. Lord DENMAN, in commenting on words of the new rules identical with our Act, said; "The plea that the close is not the close of the plaintiff is not a traverse of the possession or right of possession of the plaintiff in the *forms* of the new rules, but it is a traverse of a material allegation in the plaintiff's declaration, and the effect of such a traverse is to be considered according to the ordinary rules of pleading. As mere possession is sufficient to maintain trespass against anyone who cannot show better title, the plaintiff's allegation that the defendant broke the close of the plaintiff is satisfied *prima facie* by proof that the defendant broke a close in possession of the plaintiff, and this is not only *prima facie* but ultimately sufficient against any one who cannot avoid the effect of it by showing that, notwithstanding the actual possession by the plaintiff, he, (the defendant,) has a right to it. * * * * If then the traverse means more than that the close is not in the possession of the plaintiff, it is larger than the allegation in the declaration which it traverses, and which asserts no higher or better title than is supported by mere possession against a defendant who shows no title whatever in himself nor in any one under whom he claims." This was decided by DENMAN, C. J., and WILLIAMS, COLERIDGE and WHITMAN, JJ., and they expressed their dissent from the language of PARKE, B., in *Purnell* v. *Young*.

The same question in the same year arose in the Court of Exchequer, and PARKE, B., with the concurrence of Lord ABINGER, C. B., and GURNEY, B., said, in *Harrison* v. *Dixon*, 12 M. & W., 145; "This Court and the Court of Queen's Bench have certainly come to a different decision on the same point, the Court of Queen's Bench having held that there

ought to be a special plea in order to dispute the plaintiff's title as distinguished from the mere possession; we have thought differently." The point came up in the Exchequer Chamber in Error from the Court of Exchequer in 1848, when in the case of *Jones* v. *Chapman*, 2 Ex., 802, *Whittington* v. *Boxall* was overruled by WILDE, C. J., COLTMAN, MAULE, ERLE and WILLIAMS, JJ., (COLERIDGE and WHITMAN, JJ., who, with WILLIAMS, J., decided the latter case, dissenting,) and the question was set at rest. The declaration stated that the defendants broke and entered a certain dwelling house of the plaintiff. Pleas—1st, not guilty, 2nd, that the said dwelling house was not the dwelling house of the plaintiff, *modo et forma*. WILLIAMS, J., commenting on the language of the rule, which he condemns as not happily chosen, says of the allegation in the writ; "It is true that by the terms of the rule, taken literally, it is not this allegation, but the plaintiff's possession or right of possession which is to be traversed. But it is a principle of pleading that a defendant cannot *traverse* any matter which is not alleged or necessarily implied in the declaration, and possession or right of possession is only alleged or necessarily implied in a declaration in trespass *quare clausum fregit* as being asserted in the allegation that the close in which, etc., is the close of the plaintiff. If this be so then the defendants in the present case, inasmuch as by the plea in question they have denied the plaintiff's allegation that the dwelling house in which, etc., was his dwelling house, have specially traversed the plaintiff's right of possession thereof within the meaning of the new rules." * * There is not a word in the language of any of the seven eminent Judges who sat in this case to raise a doubt that the plea in the case, which is identical with that under consideration, traversed the plaintiff's possession. They all deliver written opinions; they all confirm the view which I now support; five of them go further and hold that this plea does more than traverse the possession, it traverses the right of possession and puts in issue the plaintiff's title as well as the naked possession, —that it permits the defendant to prove the possession of a third person under whom he claims.

Grotto v. *Farish*, Thomp. N. S. Rep., 291, and *Churchwardens of Falmouth* v. *Vaughan*, 2 R. & C., 438, are relied

on by plaintiff. In the first-mentioned case the question, I think, was neither raised nor decided. The Attorney-General, in shewing cause against a rule *nisi* to set aside a verdict in an action for trespass to land, took the sole ground that there was nothing in the pleas to shew that the plaintiff had not the *right* of possession, which, as we have seen, is a different thing from a plea traversing possession. And the sole argument made upon the other side was that the plea denying the trespass necessarily implied a denial of the possession, which shews that the attention of the Court was never directed to the plea that the land was not the plaintiff's, if such a plea was really on the record. And the judgment of the Court is conclusive that nothing contrary to the law which I have read was ever attempted to be decided. To the argument for defendant that the plea denying trespass implied a denial of possession, BLISS, J., said that since the general issue had been abolished, everything that was not admitted must be denied, which was the only proper answer to such an argument. That learned Judge did not refer to the abolishment of the general issue to meet the question as to what was a proper traverse of the allegation in the writ that the defendant broke and entered the land of plaintiff. To meet the argument that the denial of trespass was a denial of possession, he says everything must be specially denied, which is good law. Then he repeats that remark by saying that the first plea only denies that a trespass had been committed, which does not deny a possession of the land. Then he says that the plea that the land is that of the defendant does not deny that the possession is rightly in the plaintiff, which is good law. And I think he decides nothing further. And I could not on the argument and cannot now see that there was any question raised or decided as to what is or is not a traverse of the allegation in the declaration upon which possession is asserted in the plaintiff. There is not and never was in an action of trespass to land of the plaintiff an allegation in terms of possession to the land. The allegation is that the land is the plaintiff's. And all that the statute requires is that that allegation, if intended to be denied, must be traversed specially, and the only way to traverse that directly is to allege in the plea, as the defendant has here alleged, that the land is not

the land of plaintiff. So much for *Grotto* v. *Farish*, which never was at the bar, I think, understood to touch the question as to what was a traverse of possession. And, to my recollection, *The Churchwardens of Falmouth* v. *Vaughan* (2 R. & C., 438,) took the bar by surprise. Touching this last case I wish to observe with the greatest deference, that supposing it to be correctly reported, there is more than one apparent misapprehension touching the question before us. In one part of the judgment it is said that the two pleas of defendant are, first, that the land is not the land of the plaintiff; and second, that the land is the land of defendant. On the next page it is asserted that the plea there is a simple denial that the lands were the lands of the plaintiff, without any express assertion as in *Grotto* v. *Farish*, that they were the lands of the defendant, as if that might have altered the case.

It must be borne in mind that the Court of Queen's Bench was shewn by the cases cited on the argument of *Grotto* v. *Farish*, to have held that the plea that the close was not the plaintiff's traversed *only* possession, and that, to traverse the right to possession, or the title, as was argued by the Attorney-General, the defendant should allege that the close is not in the plaintiff's possession, which is a different question altogether from the present. I was confident, on examining this point, that if the attention of the Court in *Churchwardens* v. *Vaughan* had been directed to it, the decision would have been different.

I have no doubt, whatever, that the pleas to the count for conversion are sufficient, and I am of opinion that the rule *nisi* for a new trial should be made absolute.

McDONALD, J.—The first and second counts of the plaintiff's declaration are for trespass to land, &c., the third for trover of logs and wood. To the counts in trespass, that is, the first and second, the defendant, Robert Noiles, pleaded, 1st, a denial that he committed the trespass complained of; 2nd., that the land was not that of the plaintiff, as alleged; 3rd., that the plaintiff was not entitled to the land, and 4th., that at the time, &c., the land was the land and free-hold of him, the defendant.

Before proceeding to the consideration of the count for conversion and the pleas pleaded to that count, I will endeavour to dispose of the questions which arise under the counts for trespass. They are entirely, questions of pleading, the jury having found the facts in favour of the plaintiff, so far as such are not admitted by the pleadings. It is necessary to bear in mind that, but for section 145 of our *Practice Act, Revised Statutes, (4th Series,)* chapter 94, and the construction put upon that section by this court, no serious difficulty could have arisen; and, if that section had been identical with the English rule of practice in similar cases, the defendant would have been entitled to recover under his counts for trespass, unless protected by section 152, to which I will again refer. The mistake is, as it appears to me, in assuming that they are identical. The section of our statute to which I have just referred provides that, "In actions for trespass to land a plea that the defendant did not commit the trespass complained of shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession, which, if intended to be denied, must be traversed specially." The English rule, which is claimed to be identical with this section, would have been entirely so if the words "*the plea of not guilty*" had been left out in that rule, and the words "*a plea that the defendant did not commit the trespass complained of,*" had been substituted. The plea of "not guilty" is recognised by the English rules of practice referred to. Not so with us, as it is entirely abolished by section 152 of the *Practice Act, Revised Statutes*, which enacts that "the general issue and all general pleas are abolished, and every pleading shall specify particularly and concisely the facts intended to be denied."

Now we are fully aware of the numerous defences which, under the general issue, until it was abolished, could have been given in evidence, and it is not difficult to see that if that plea had not been entirely abolished by section 152 of our own statute and a different practice prescribed by that and section 145, our courts would have followed the course of practice pursued in the English courts. I must confess that, in my opinion, our statute is very much preferable to

the English rule, and that our decisions, based upon our statute, are much more conducive to the ends of justice and the proper administration of law than the English decisions, as based upon the rules of practice in their courts.

"As tresspass to land is an entry upon, or any direct or immediate interference with the possession of the land, it is commonly described by the term breaking and entering;" *Bullen & Leake*, 258. And it will not be denied that possession alone is sufficient to enable a party to recover in that action against any person who does not show a better right. When it is alleged in a declaration that the defendant broke and entered the plaintiff's land, it is not necessarily implied that the latter was owner in fee simple, nor even a tenant of the close described, nor that he had any other title than that evidenced by his bare possession, because that possession is quite sufficient as against a party who is not shown to have a better right. And, as it is necessary that he should have the possession, it would not be enough to prove that he had the title merely, if the question was properly put in issue, while another, in active possession, may be entitled to recover for the same cause of action. Let us see, then, whether the defendant, by his pleas, puts in issue that essential part of the plaintiff's case—the possession—always recognized in law as impliedly alleged in a declaration in trespass for breaking and entering the plaintiff's close, (*B. & L.*, 358, *note.*) The first plea, which only denies the commission of the alleged trespass, clearly does not deny such possession. Neither does the second, which only says that the land was not that of the plaintiff, because that denial is quite consistent with the plaintiff's being in possession and with his right, in virtue of that possession, to succeed even against the owner of the soil or the reversioner. The third plea, which only says that the defendant was not entitled to the possession, is no answer, because that may be true, as between him and the owner of the soil, and yet his possession, in fact, might give him a right of action against a defendant, not being the owner; and the fourth plea, which only alleges that the land was the freehold of the defendant, does not, for similar reasons, put the possession in issue. Section 145 declares that, in actions of trespass to lands, the plaintiff's possession, if intended to be denied,

must be "traversed specially," and section 152 abolishes the general issue and *all general pleas*, and declares that "every pleading shall specify *particularly and concisely*, the facts intended to be denied." Was the fact of possession intended to be denied here? If not the defendant's case is given up. If it was so intended, is it specified "particularly and concisely," as our statute demanded? I think not. And, if in England, there was either a statute or a rule of Court binding as a statute like this, (sec. 152), can it be said that English Courts would ignore them, as we are asked here to ignore the plain words of our act? I mention this independently of section 145, which is claimed to be similar to one of the English rules. It is not contended that they have a rule similar to section 152, while is applicable here in all cases.

In view of that statute it seems to me that reason alone should lead us to the conclusion that, under the pleas of Robert Noiles there is no denial of the plaintiff's possession at the time of the alleged trespass. But we have authority also to guide us. I mean the authority of our own Court in the several decisions given since the present statute was passed. Up to this point, I have dealt with the pleas of Robert Noiles alone because he pleaded separately, and his pleas are more comprehensive than those of his co-defendants, Peter Noiles and Placid Arsino, who only pleaded a denial of having committed the alleged injuries. It is not necessary further to refer to their pleas to the counts in trespass, as they deny nothing but the commission of the alleged trespass, which the jury have found for the plaintiff. The case then stands in this position, under the counts for trespass, that the defendants, not having specially pleaded a denial of the plaintiff's possession, must be taken to have admitted it; and, without an amendment of his pleas he cannot, as I think, succeed. That amendment has been moved for, at the argument, and, while I hold that the Court has the power so to amend, under the authority of our own statute, chapter 94, section 191, and of *Parsons* v. *Alexander*, 5 El. & Bl., 265, and of the other cases cited at the argument from our own reports, I am of opinion that the power, if exercised at all, ought to be exercised with great caution; and I can see no good reason to exercise it in this case.

Reference has been made to a case decided in this Court, *Johnston et al.* v. *Lithgow, et al.*, 2 R. & C., 567. In that case I concurred in refusing the amendment applied for, because, if granted, I thought it would be carrying the power of amendment further than we ought to carry it. The argument of counsel is not given in the report of that case, and I think it probable that the head-note is based upon a statement in the opinion of the learned Judge who first read his judgment, and without reference to the other opinions read,—certainly to my expressed opinion at the time; but it is an error to say, as reported in the head-note and in one of the opinions reported, that the verdict in that case was in favor of *Johnston, as surviving partner of Malcolm.* I would have had some difficulty in refusing the amendment if I had not found that the verdict had been in favour of Johnston, "*not as survivor of another who had a joint interest with him, but in his own right,*" as I mentioned in my opinion at the time. I italicise the words I used. In that case it would be useless to amend the writ by adding the words "surviving partner," &c., without amending the verdict as well, so as to agree with the writ, and, to amend the writ a second time, it would, in my opinion, be necessary to amend the rule for the first amendment also. This would be going further than I think we would be warranted in going, whatever power of amendment the court may possess. It is, however, a very different thing to exercise the power of amendment when the object is simply to make the pleadings conform to the evidence and to the verdict, in a case which had been necessarily tried in the same manner and with the same results as if the amendment had been made before the trial. If the verdict in this case had been objectionable and if the ends of justice had clearly demanded that an amendment should be made, in order to have the verdict set aside, I think we have the power so to amend; but the case as it stands does not appear to me to justify the exercise of the power of amendment to the extent required. I mention the case of *Johnston* v. *Lithgow*, as it was referred to at the argument and in order to avoid any misapprehension of my own views, which naturally might have arisen on reading the head note of the report and the opinion of one of my learned brethren.

But, as already stated, there is a count in the declaration for conversion to which the defendants, Peter Noiles and Placid Arsino, pleaded simply a denial of the alleged conversion. They also plead, to the counts in trespass, only a denial that they committed the trespasses alleged. They are not in a position, therefore, to deny the plaintiff's property; and the evidence is, as I think, conclusive against them as it is against the other defendant, Robert Noiles, under the trover count. At least it is, to my mind, conclusive, in view of the fact that it was submitted in an unexceptionable manner to the jury, who found the facts in favour of the plaintiff. I have already cited section 145 of our Practice Act, which is confined to actions for trespass to lands; and, while I am of opinion that that section requires the defendant to plead, *specially*, the fact of the plaintiff's not being in possession when such a defence is relied upon, I have no doubt that it does not extend to an action for conversion of goods. Nor do I think that it could possibly be so construed, because, while actual or constructive possession is essential on the part of the plaintiff to enable him to recover in an action of trespass, it is different in an action for conversion, which will lie where the plaintiff is entitled to the possession wrongfully withheld from him.

Some misapprehension has naturally arisen from reading the note at page 356 of *Bullen & Leake*, where it is said, referring to actions for trespass, "the plaintiff, in this action must, at the time of the trespass, have the present possession of the goods either actual or constructive, *or a legal right to the immediate possession which is said in the case of personal property to draw to it the possession.*" I was, at first, unable to understand the latter part of that note which I italicise; but, upon looking carefully at the authority relied upon, *9 Bing.*, 471, 477, I find that the case was not trespass at all but trover, in which it is quite clear that the *right* to the immediate possession, if such possession were withheld, would have been quite sufficient. In that case one of the learned judges who delivered the opinion of the Court (PATTERSON J.,) said, "the action of trespass is very different—it is founded not on property but on possession, and where there is *no actual possession*, but right of property, it is said to draw to it possession." The words "no actual possession" as here used, do not mean,

as I take it, no actual possession by the plaintiff alone, but also "no actual possession" by any body else inconsistent with the right of the true owner, in which case the constructive possession clearly follows the ownership of the property. I think that there is ample evidence of conversion by all the defendants, and that under that count we would not be justified in disturbing the verdict; and I am opinion that under the counts in trespass the plaintiff's possession is admitted, because it is not denied; that we have power to amend the pleadings, at any stage of the proceedings, under section 191 of our Practice Act and the authorities cited, but that we ought not to exercise that power in a case like this. For these reasons I cannot concur in the opinion that the verdict ought to be disturbed.

JAMES, J.—At the argument of this cause it was contended by plaintiff's counsel that the defendant was precluded from contending that plaintiff had not proved possession because, although he had pleaded to the count for trespass to the land, that the land was not the plaintiff's, and also that the plaintiff was not entitled to the possession of the land, yet there was no plea on the record denying that plaintiff was in possession, and *Grotto* v. *Farish*, Thompson's R., 291, (1858,) and *The Churchwardens of Falmouth* v. *Vaughan*, 2 R. & C., 438, (1877,) were cited in support of this contention. The authority of these cases having been questioned at the argument and also at the argument of another case which was before us during the present term, I am induced to make a few remarks upon them. The rule of pleading contained in our *Practice Act*, R. S., cap. 94, sec. 145, was introduced into our system from the English rules of pleading of 1853, (B. & L., 870) by our Stat. of 1855, cap. 4, sec. 241, and was embodied in the *Practice Act*, in R. S. 2 Ser., cap. 134 sec. 81. It was originally passed as an amendment to the first *Practice Act* of 1853, p. 43, which contains in section 54 a very sweeping enactment intended to abolish the whole system of pleading technicalities which so disfigured the English system. It enacted that every declaration and all subsequent pleadings which should "clearly and distinctly state all such matters of fact as are necessary to sustain the action, defence, or reply,

as the case may be, shall be sufficient, and it shall not be necessary that such matters shall be stated in any technical or formal language or manner, or that any technical or formal statements shall be used." And in R. S., 2nd Ser., p. 499, a further sweeping clause was inserted with the same praiseworthy object; sec. 89, "the general issue is abolished, and every pleading shall specify particularly and concisely, the facts intended to be denied." In fact the whole statute, as it stands now in our Revised Statutes, was designed from the first to get for-ever away, as far as possible, from the effects of the multitude of decisions on technical points which regulated the pleadings and practice of the Courts in England, which were a disgrace to their jurisprudence, and under which the whole system at last sank, crushed by its own weight, and was replaced by the simpler machinery of the Judicature Act, after many partially successful attempts had been made to improve it. One of those was the adoption of the rules of court entitled of Trinity Term, 1853, but which were in fact adopted in Hilary Term of the same year, (see B. & L., 860, note,) a few weeks before rule 19 was incorporated as a section of our statute of that year, as I have already mentioned. No better instance could be given of the mischievous effects of the technical system of the English jurisprudence at that time than the fate of Rule 19; (sec. 145 of our Act, 4th Series, cap. 94.) That rule established as law, that in actions of trespass to land the plaintiff's possession or right of possession, if intended to be denied, must be *traversed specially*, but the two principal courts, after a number of solemn arguments, bristling with technical reasoning and precedent, at last arrived at the conclusion that the rule did not mean what it said, but a very different thing. They decided that under this rule it was not necessary, in order to deny the plaintiff's possession, to *traverse it specially*, in direct contradiction of the words of the rule. They were logically forced, I admit, to this apparently absurd conclusion, because, in adopting the rule they did not then or afterwards adopt from our Act the two very wise and sensible provisions contained in sections 116 and 152, and in fact very many other sections in our Act which were aimed at the whole system of technicality in pleadings and practice. For instance, they retained all the

forms of the general issue except *nil debet*. (See Rules of 1853, above cited.) They made several exceptions, it is true, but when they came to carry out at least one of these exceptions, our Rule 145, they were obliged, by the force of decided cases, to distort it altogether from its fair and natural meaning.

Our courts were differently situated; our legislation struck at the root, instead of attempting to lop off a few of the branches. By section 116 of chapter 94 they had, in 1853, declared war formally upon all technicality in pleading, by adopting Rule 19; in 1855 they enacted specially that if a defendant wished to deny the plaintiff's possession he must *expressly* deny it in his pleadings; and by the Revised Statutes passed May 8, 1858, they enacted our section, 152.

This was the state of the law when *Grotto* v. *Farish* was decided, and it was decided by BLISS, DESBARRES and WILKINS, JJ., all lawyers of large experience, and one of them, Judge BLISS, remarkable as a technical lawyer in the best sense of the word; that is, he was exceptionally precise and accurate in his administration of the law, and in his knowledge of and deference to decided cases,—with which his memory was stored to an unusual extent. These Judges were well aware of the previous condition of the law in England and in this Province, and of the radical changes which were being made by our legislation. They explicitly recognized that a great change had been made on this very point, and this change they intended to "enforce." BLISS, J., says in *Grotto* v. *Farish*, "By our present Practice Act, *since the general issue has been abolished, everything that is not admitted must be denied.* The reason of the rule now 'enforced' is to prevent the introduction of evidence on what it is not intended should be denied." It is so apparent from the decision that the law the Court intended to "enforce" was not section 145 alone but sections 116 and 152 as well,—the latter of which is especially mentioned in the judgment,—that it is scarcely necessary to remark that our two decisions, the authority of which is now questioned on the authority of subsequent English cases, are based on a totally different state of the law from that under which the English cases were decided, and therefore the latter are not at all applicable.

The adoption, by our statute, of the rule contained in section 145 along with sections 116 and 152, introduced for the construction of the former, are entirely new principles from those which then prevailed and continued to prevail in the English courts. We were bound to construe it according to its plain and simple meaning, while they, for want of these rules, were bound to go on construing according to technical decisions extending over centuries. I do not hesitate to say that the English system of pleading then in use and which continued in use until the passing of the Judicature Act, was a disgrace to a civilized nation. It had the effect of keeping the finest minds on the Bench and at the Bar perpetually employed in wire-drawing and hair-splitting calculated to dwarf their intellects and degrade their high and honorable profession, besides prostituting the public justice of the country by a system of technicality by which, as in the case of our section 145, black was often logically proved to be white; and if the whole system had not broken down with its own rottenness and been replaced by the simple and rational system provided by the Judicature Act, I have little doubt that by this time it would have been conclusively established that white was no color at all.

The credit of inaugurating and carrying through the legislation for improving our system of pleading and practice, adopted at that period, was due to Sir William Young more than to any or all of those by whom he was assisted. Mr. Henry, now Judge of the Supreme Court of Appeal, gave him an active support, and he had the aid of the ripe legal scholarship of Judge Bliss, who gave the decision of the Court in *Grotto* v. *Farish* upon the rules of pleading which he had assisted in maturing. The extent and value of the changes then effected can only be duly appreciated by those who were educated as I was, and who had practised as I did for nine years, under the old system.

The decision in *Grotto* v. *Farish* remained unquestioned in this Court from 1858 until it was confirmed by *The Churchwardens* v. *Vaughan* in 1877. To what extent, in the meantime, its effect was overlooked in practice by members of the legal profession, I am not aware; but I know that it was carefully observed in my own practice and in the practice

of more than one of my learned colleagues now sitting with me on the Bench, one of whom was interested in the decision. If it was overlooked by some it was because they preferred going for their forms of pleading to the English books, instead of studying and practising the much easier and simpler forms prescribed by our own statutes.

The Churchwardens v. *Vaughan* was decided by four Judges, one of whom was SIR WM. YOUNG, the originator of our simple and valuable system, and two of them sat with BLISS, J, in deciding *Grotto* v. *Farish*. In both cases the Court were unanimous, and it does appear strange that their authority should, at this late day, be seriously questioned.

I am, therefore, of opinion that upon the pleadings in this case the plaintiff's possession of the locus is admitted, and therefore that the verdict in his favor on the first count should be sustained, unless there is some reason in the case to force me to a different conclusion.

But, assuming that we are bound to give effect to these cases, it becomes necessary to refer to the point taken at the argument that the objection that there was no plea denying possession was not taken at the time; and defendant's counsel cited *Gillis* v. *Campbell*, James R., 48, and *Halliburton* v. *Malloy*, Ib., 246, in which it was held that a verdict could not be set aside on objections not taken at the trial. But in both these cases the objections were as to defects in the evidence. No cases were cited nor do I know of any to shew that a sound objection to the pleadings not taken at the trial, should not prevail on motion for a new trial. In assigning particulars of error upon a writ of error the plaintiff in error is not restricted by any such limitation, but he may assign as many errors as he can find on the face of the record.

To the count for conversion the defendant pleaded that the property "was the property of the defendant and not the property of the plaintiff," and this, I think sufficient, although the same plea would not be sufficient in answer to a count for trespass to land. The distinction is that in trespass to land the action is based on the plaintiff's *possession*; but in conversion it is based on the plaintiff's *property* in the chattels. Possession may be and often is a material element in the

case, but only as a means of proving property, and therefore it is a question of evidence and not of pleading.

I am free to admit that, but for section 145, we would be bound to hold that the denial that the land was the land of the plaintiff was as explicit a denial in trespass to land as the denial to plaintiff's property in a chattel in conversion. But the action in trespass to land is, in law, an action for trespass to land in the *possession* of plaintiff, and not to land to which he has title. The Legislature did not choose to depart from the time-honored form of declaring that "the defendant broke and entered the plaintiff's *land*," by substituting "land in possession of plaintiff." Under section 152 alone the plea that the land was not the plaintiffs' land would have been an explicit denial, *ipsissimis verbis*, of the allegation in the writ; but it would not have put in issue in so many words the plaintiff's possession, but rather his title, which, in trespass, is not the issue to be tried, except in cases where the defendant pleads *liberum tenementum*. Therefore the Legislature enacted section 145 requiring that the plea, if intended to deny the plaintiff's possession, must do so specially by stating that he was not possessed, in order that the issue should distinctly specify the point in dispute. This was not necessary in conversion, which depends on property and not possession.

Application was made at the argument by defendant's counsel for leave to amend, by adding a plea denying plaintiff's possession, on the authority of *Parsons* v. *Alexander*, 5 El. & Bl., 265, and other cases cited in *Harrison's C. L. P. Act*, 315. I have no doubt, independently of the cases, that this Court has the power in its discretion to grant the amendment asked for. This power was exercised in *Boutilier* v. *Knock*, (1857), 2 Old., 77. See also *Battleman* v. *McKenzie*, 2 Old., 159, and *Johnson* v. *Lithgow*, 2 R. & C., 567.

If the learned Judge who tried this cause had reported in his minutes, or orally to the Court on the argument, as did ERLE, J, in *Parsons* v. *Alexander*, that "the defendant's case is such as to require the Court to give him every fair assistance," I would not hesitate to grant the amendment, but I am not aware of any ground in this case on which the Court should exercise a discretion, but sparingly resorted to

either here or in the English Courts. I think the verdict for plaintiff should be sustained on both counts.

McDONALD, C. J., announced that as the Court was equally divided in opinion the rule would drop.

SHARP *v.* MAXNER.

(Before McDONALD, SMITH, JAMES and WEATHERBE, JJ.)

(Decided January 14th, 1882.)

Agency.—Count for money received.—Plea to jurisdiction.

PLAINTIFF brought an action against the defendant for the price of a horse, and the declaration contained also the common counts. It appeared that the horse had been sold, not to defendant but to a third party, from whom defendant received $65, to be paid to the plaintiff. He paid only $52, used the balance of $13 for his own purposes and told plaintiff he would give him the balance. He afterwards claimed a set-off against plaintiff, of which there was no plea.

Held, that in the absence of a plea to the jurisdiction, as required by the County Court Act, plaintiff was entitled to recover the $13 under the money counts, and that the judgment for defendant should be reversed. McDONALD, J., dissenting.

This was an action for the price of a horse, the property of plaintiff, sold by defendant to Dr. Woodill. The action was tried before Judge BLANCHARD, Judge of the County Court at Windsor, on the 14th February, 1880. The action was brought 19th May, 1879. Judgment below was given to defendant, to set aside which a rule was taken out. Defendant received from Dr. Woodill a cheque for $65, in part payment for the horse, $52 of which he paid over to plaintiff, and $13 of which he appropriated to his own use, promising to pay the balance shortly. The cause was argued at the last term of the Court before SIR W. YOUNG, C. J., and McDONALD and WEATHERBE, JJ. As there was some doubt about the jurisdiction of three Judges to sit, the case now came on for reargument.

Rigby, Q. C., in support of rule—The defendant admits a balance of $13 in his hands, for which we were entitled to judgment in the absence of a plea to the jurisdiction. The defence of want of jurisdiction can only be taken advantage

of by plea; Acts of 1879, chapter 20, section 3. This Act was passed on the 17th April, 1879, a month before the action was brought.

J. J. Ritchie, contra.—A party to a contract can only recover money in the hands of a third party where there is privity of contract or some binding obligation. There is no evidence of a contract or binding engagement of the defendant to hold money for the plaintiff's use. (WEATHERBE, J.—He said first, I received a cheque for $65 for the mare. He paid over $52, and said the balance of $13 was paid on account of oxen which he had bought, and finally that he had placed the money to the credit of the plaintiff, and had an offset. Taking all the evidence together, I should think there is evidence of a debt. MCDONALD, J.—The Judge found there was no promise to pay.) Yes, and there is evidence to support it. The reference to the balance of the money referred to the balance over and above the $13, which the defendant had not yet got from Dr. Woodill. There was, therefore, no express promise to pay the balance of $13—on the contrary, the defendant asserted a right to retain that money, crediting the plaintiff with it on his contra account. (WEATHERBE, J.—No such language as that was used at the time, but he only gave that evidence afterwards on the stand. I have no doubt about it. SMITH, J.—The case of *Barren* v. *Husband*, 4 B. & Ad., 613, was very similar to this. There the defendant paid part of the money at the plaintiff's instance, and it was held that there was no promise to pay the balance.) The want of plea and objections to evidence have been waived, *Waters* v. *McCulloch*, 2 R. & C., 74; *7 H. & N.*, 1006; *2 Taylor*, 1881; *Hilliard on New Trials*, 557; *9 A. & E.*, 337; *7 Q. B.*, 735.

Rigby, Q. C.—The cases cited are very different from this. In those cases evidence is given by the party wishing to take advantage of it, in reference to a matter that is not pleaded and no objection is made. In this case the plaintiff got the admission that the defendant held $13 of the money sued for, and there was no plea of set-off. The plaintiff was entitled to the rest. The defendant merely says he had an account against the plaintiff, but there was no evidence to support a plea of set-off.

WEATHERBE, J., now, (January 14th, 1882,) delivered the judgment of the Court:—

An agent who receives money to pay to a third person, as defendant did here from Woodill to pay to plaintiff, although he assents to hold it for that purpose, is accountable to his principal alone until he has agreed with the third person,—the plaintiff in this case,—to hold the money to his use.

The only question for our consideration is whether defendant agreed with plaintiff to hold the balance of thirteen dollars in question in this case. It is admitted that defendant received the cash for the cheque in question and paid over to plaintiff fifty-two dollars.

The plaintiff, in his evidence, says: "Defendant told me about a week after he returned to Windsor, that he had got a cheque from Dr. Woodill for $65 for the mare. He said he did not want to draw the cheque till after ten days, when he paid me the $52. He told me had bought a pair of oxen the day before and that he had taken the balance of this cheque to pay on them. He told me he would give me the balance for the mare shortly." This balance, I suppose, may be said to be the balance of the whole price, including the $13. Can there be a doubt that if defendant had received a cheque for the entire price this undertaking would have rendered him liable?—And *a fortiori*, is this not binding within the principle of law on which we are all agreed as to the thirteen dollars? It must be observed that there is no contradiction of this testimony of plaintiff. I think there is a piece of testimony in defendant's evidence which, if possible, strengthens this view of the case and leaves the inference indisputable from defendant's own mouth of his undertaking to hold the balance of the proceeds of the cheque to the plaintiff's use. These are the words from the minutes of the learned Judge below: "Some time after I came back I saw plaintiff, I told him I had a cheque for $65 from Woodill, and that he did not want me to present the cheque for eight or ten days; after that I paid plaintiff $52 of the cheque, and I had an account against him which would make up the balance." There is no plea of set-off, and it would appear that the learned Judge below has allowed this $13 to defendant, which cannot

be permitted. We think the appeal must be sustained with costs.

SMITH and JAMES, JJ., concurred.

MCDONALD, J., read the following dissenting opinion :—

This is an appeal from a judgment of the learned Judge of the County Court at Windsor, in an action commenced in that Court upon the common counts, for the price of a mare alleged to have been sold by the plaintiff to the defendant, the judgment being in favour of the defendant. Although the latter negotiated the sale, the evidence so clearly shows the animal to have been sold and delivered, not to him, but to Dr. Woodill, that, if the court below had found otherwise, the decision should have been reversed, if appealed from; but the defendant got a cheque from Woodill for $65, part of the price of the mare, $52 of which he paid to the plaintiff; and, if he had pleaded want of jurisdiction under the requirement of the County Courts Act necessitating that plea, the plaintiff would be out of court. As it is, he must rely upon his plea of never indebted as alleged.

The plaintiff now claims judgment for at least $13, under the count for money had and received, though undoubtedly, the action was commenced against defendant with a view of holding him liable, as purchaser,—the $13 being the difference between the amount of the cheque and the sum paid over. If that money was at all received by the defendant, (and the affirmative of that question is upon the plaintiff,) it must have been received as the agent of Dr. Woodill, who, under this evidence, now has the right to countermand the instructions which he gave, if he did give them, to hand the money to the plaintiff, as there is no evidence to show an assent or promise made by defendant to the plaintiff to pay the money to the latter. *Williams* v. *Ernest*, 14 East., 597; *Fisher* v. *Miller*, 7 Moore, 537; *Barron* v. *Husband*, 4 B. & Ad., 611. "When an agent receives money to pay over to a third person, although he assents to hold it for that purpose, he continues to be accountable to his principal alone until he has entered into a binding engagement with the third person to hold the money to his use, and not until then will he be liable to the third person for money had and received;"

Roscoe's N. P., Ev., 518, and the authorities there cited. Under the evidence before us, Dr. Woodill appears to be now liable for the amount claimed by the plaintff, though, if sued, he may of course successfully set up other defences not now disclosed; and the evidence that shows his liability shows, at the same time, the non-liability of the defendant.

So far as the balance of $13 claimed is in question, there is nothing to show a promise, either express or implied, on the part of the defendant to pay it to the plaintiff, but the contrary; and I am glad to be able to come to this conclusion, as this action should never have been brought, and probably never would have been, if some difficulty had not arisen between the plaintiff and Dr. Woodill, who was the real purchaser of the mare.

This claim under the count for money had and received is only resorted to upon a chance technicality when the plaintiff failed, upon the merits, to hold the defendant liable as purchaser. I think that he has also failed to show that he is entitled to recover under the count for money had and received, and I am of opinion that the appeal should be dismissed with costs.

CORBETT *v.* PROVIDENCE-WASHINGTON INSURANCE COMPANY.

(Before McDONALD, SMITH, JAMES and WEATHERBE, JJ.)

(Decided January 14th, 1882.)

Constructive total loss.—Abandonment.—Justifiable sale.

A VESSEL was stranded at the mouth of Shelburne harbor, which she was seeking to enter under stress of weather, being on a voyage from Sydney, C. B. to Boston. The harbor was frozen for four miles from the town, and the hull, rigging and hawsers were encumbered with ice. Her steering apparatus parting, she struck on the rocks and became stranded early in the morning of Saturday, at nearly high water. Notice of abandonment was given in Halifax on behalf of the owners on the evening of the following Monday, to which the underwriters replied declining to accept it without further particulars, and the vessel was sold on Tuesday, after the master had communicated with the owners. Evidence was given that the tide did not suit on Saturday to make any effectual attempt to float the vessel, and that the drift ice prevented getting out more than one anchor; and there was evidence that all that was useful had been done on that day, that on Saturday night she filled with water, and that on Sunday, a gale coming on, she was bilged. On Monday a winter gale was blowing with heavy sea breaking over the vessel, so that the crew could not survive on board. The vessel was grinding on the bottom and was in danger of going to pieces, so that experienced people thought she was in a hopeless condition. Afterwards, by the aid of a favorable tide, and by a vessel, not available when the notice of abandonment was given, she was got off and repaired. The Judge who tried the cause without a jury, found for plaintiff, and the Court refused to set the verdict aside.

This cause came before the Court *in banco* on a rule *nisi* to set aside a verdict for plaintiff for $1840, the cause having been tried before McDONALD, J., in January, 1880. The cause was partially argued February 25th, but, in consequence of the illness of Judge Smith, the argument was not concluded, and the cause was argued *de novo* on a subsequent day.

The schooner *Janie R.*, while on a voyage from Sydney, C. B. to Boston, put into Shelburne, N. S., on February 7th, on account of stress of weather. After remaining there for seven days she proceeded upon her voyage, but was obliged to put back. While re-entering the harbour on Saturday, 15th February, she mis-stayed, on account of an injury to the steering gear, and went ashore. A survey was held upon the vessel on Monday, the 17th, and on that day notice of abandonment was given to the underwriters in Halifax. On the following day, the 18th, the vessel was sold, and on the 20th she was got off. The underwriters having declined to pay the claim of the plaintiff, the mortgagee, he brought an action, which was tried before McDONALD, J., in January, 1880, who found in favor of plaintiffs for $1840.

Rigby, Q. C., objected that the rule had expired. (*Henry* was allowed to proceed with the argument, with the understanding that he would not be prejudiced and might take such steps as he should think best to remove the difficulty.)

Henry, in support of rule.—There was no vigorous *bona fide* effort by the captain to get the vessel off between the time of her going on shore and coming off. The general rule is that, although a loss happens in consequence of negligence of the captain, yet the insured can recover; but in regard to the right of the master to sell there must be the highest judgment which could be reasonably exercised under the circumstances, and absolute good faith; *Arnould on Insurance*, Vol. 1, 333. The captain's right to sell arises wholly from the exigent circumstances of the case; mere ordinary prudence in the exercise of the right to sell is not enough. The agency of the captain to sell, which ordinarily he does not possess, is created by the circumstances. There can be no loss unless the circumstances justify the sale. The circumstances in the present case never amounted to a constructive total loss.

The notice of abandonment is worthless if given at any time before the circumstances justify it. Here the vessel was not abandonable at the time the notice was given. It was given at five o'clock on Monday afternoon, the 17th, and the vessel was sold on Tuesday, the 18th. It was idle to think of getting the vessel off, considering that she went on at high tide under full sail in a seven knot breeze, without first discharging the cargo or a portion of it. If the potatoes had been thrown overboard they would have been the subject of a general average, and they should have been thrown overboard at once. The mode adopted to discharge the cargo, considering the dangerous position of the vessel and her liability to go to pieces, was mere trifling. No sufficient efforts were made to get the vessel off; only one anchor was put out and the windlass was powerful enough to drag it home, and did drag it home. The day the vessel went ashore there was another vessel in the harbor in open water. It is also admitted that the vessel was kept dry until Monday morning. This would have given ample time for the removal of the cargo. The whole evidence shows perfect supineness on the part of the captain. The evidence of McAlpine, one of the surveyors, is that the captain, knowing the vessel went on with a high tide, could not expect to get her off without lightening her. The captain was in communication with the owners. After the time the vessel went on shore there were five high tides, during which efforts should have been made to get the vessel off, leaving out the tide on which she went on shore. Purdy, the mate, when pressed as to the efforts made, swore that efforts were made on five occasions; but his evidence shows that he left the vessel at five on Saturday evening, and slept on shore, and came back at six the following morning. On Sunday night he left at twelve and returned at six the next morning. He says, further, that no effort was made after Monday morning. This would only leave four tides at which he pretends that efforts were made; during these he, the chief officer, was away two. This does not look like serious effort.

The next point is, that at the time the notice of abandonment was given, the vessel was not abandonable, there was not a timber broken. She was chafed, and a butt driven in, which rendered her leaky.

Inasmuch as the vessel was never damaged to the extent of what her repaired value would be, she was not abandonable. (WEATHERBE, J.—You must add to that the element of imminent danger. Why not? A vessel may be abandoned in a case of imminent danger where she has not suffered the slightest injury.) I think not. The doctrines which apply to sale and abandonment are entirely different, and in this case the sale may be left out of the question altogether, because it appears that circumstances did not justify it. I agree that where a constructive total loss is shown actually to exist, the party is entitled to recover, and the happening of some fortuitous accident subsequently, through which the vessel is got off, cannot affect the question. But in every case were a vessel is stranded and it is asserted that at the time notice was given it was justifiable under the circumstances, it must appear affirmatively that it would cost as much or more to repair the vessel than she would be worth when repaired, or that there was at the time of notice given, no reasonable hope of restoring her; *Hall* v. *Franklyn Ins. Co.*, 9 Pick., 417–476.

Rigby, Q. C., contra.—There may be a constructive total loss where the vessel is in a foreign country, or if she is in imminent peril of being totally destroyed and there is no time to give notice. In such a case, if the master deems it best, in the exercise of a prudent judgment to sell, he may do so, and in making the sale he acts as agent of the underwriters. If the circumstances are such as to justify abandonment, the property passes to the purchaser. There is nothing here from which it can be assumed that it did cost less than this vessel was worth to get her off. We don't know what the American vessel received, but under the circumstances she would be entitled to half the value of the vessel as salvage, and if you add to that the cost of repairs, you have a sum in excess of the value.

If the abandonment on Monday was justifiable, the property passed absolutely to the underwriters, and the sale on Tuesday was a sale by the captain, as agent of the underwriters, who can recover the vessel back if the sale was improperly made. But it looked on Tuesday, when the sale

was made, as if, in a few hours, not a plank would be left together. There was no time to consult the underwriters, and it was thought best, in the interest of the latter, to sell. It is argued that the captain should have exercised the wisdom, not of a man, but of the Supreme Being. He should have immediately commenced discharging the potatoes. By some omniscience he should have known that there was a tug-boat procurable; he should have put out a second anchor, or he should have used samson-posts. Surely it comes to this, did the captain, in the exercise of the intelligence he possessed, be it great or small, do all that seemed to him necessary to rescue the vessel, and not whether some one else would have done something different.

As to sale on account of imminent peril. *Phillips on Insurance*, section 1513; *Arnould on Insurance*, 333. This was only a general rule to cover general cases. It is easy to see how applicable the rule would be to the case of *Berteaux* v. *The Cobequid Insurance Case*. There the vessel was rescued almost immediately, and there seemed to be no reason shown why the exertions were not used. There may be cases where a sale would be justifiable without any exertions at all. (*Henry*.—I admit that.) In cases where there is time for effort exertions must be made, and the sale is to be made when the exertions have failed. If you go into the question as to whether the master used every effort before the sale, I don't know where the limit would be, and it would result in much uncertainty as to the security of the insured. *Parsons on Insurance*, vol. 2. Abandonment should not be made on mere conjecture; but the insurers are entitled to any information, by the withholding of which they might be prejudiced. See also p. 149 as to necessity of sale. See pp. 120, 121. Corbett is the assignee of the mortgagee and stands in a different position from the owner.

Henry, in reply.—It is clear in this case that the sale cannot be justified. In the case of a vessel uninsured the captain can only sell where the owner cannot be communicated with. *7 Allen*, 232. A man's property cannot be taken and sold against his will, and he be compelled to pay for it because it has been sold. There is no instance where a sale can be justified where the underwriters can be communicated with;

if it can be done the underwriters must be communicated with. The captain has an implied authority to bind the underwriters only in cases where it is impossible to consult with them.

13 Pickering, 43, *L. T.*, 411. The reasonings of COLERIDGE and GROVE, JJ., though opposed to one another, are equally in our favor as to the abandonment. The vessel having been restorable to the owners, and being got off without damage, must be regarded as if no sale had taken place. *Kenny* v. *Halifax Marine Ins.*, Thomson's Cases, 113; *Doyle* v. *Dallas*, 1 M. & R., 54; Ib., 106; *4 C. & P.*, 283; *Martin* v. *Crockett*, 14 East., 465; *Tanner* v. *Bennett*, 1 R. & M., 182; *15 Q. B.*, 649; *3 F. & Fin.*, 942.

The English and American rules in reference to abandonment are different. Under the American rule, when a vessel is captured and so becomes abandonable, the rights of the parties stand or fall by the abandonment; but in England if a vessel be captured and restored, the insured cannot recover at all. The same principle applies here.

WEATHERBE, J., now, (January 14th, 1883,) delivered the judgment of the Court:—

It is usually said there are two kinds of total loss, absolute and constructive, and that in all cases of constructive loss there must be notice of abandonment. It seems now to be admitted by distinguished judges, that the term "constructive total loss" is not a happy phrase, and perhaps sometimes its use has been the occasion of misapprehension. It must be apparent that it is very often difficult to draw the line between what is called absolute and constructive total loss, and no definition of either term seems to be altogether satisfactory. I am not at this moment aware of a case of total loss where the introduction of any distinction is claimed to assist us, except to distinguish those cases where notice is required from those where it is dispensed with, and there it often fails, I think. It is a familiar thing to say that if a ship becomes submerged in the sea so that no vestige remains to be seen she becomes an absolute total loss. In that case, it is said, the owner can recover the whole sum insured, and that without giving notice. But he could only recover the whole sum upon the ground that she cannot be weighed up so as to take

the sea at a greater cost than she would be worth when restored. And notice of abandonment could only be dispensed with, even if she became worthless as a ship, where there was nothing of value that could be recovered from the wreck. In every case where the vessel is so injured by the peril insured against as no longer to be fit for use as a vessel without too great an expense—that is, a cost exceeding her value when restored—she is totally lost. And in all cases of total loss there must be abandonment, unless there is nothing whatever of value to abandon, neither the hull nor spars nor other portion of the wreck, nor any material of the ship, or apparel; nor—where she is sold—the proceeds of the sale; and in all cases of total loss, wherever anything remains of appreciable value there must be notice of abandonment, unless in some way the owner is excused. And he cannot be excused wherever anything remains, and he has an opportunity of giving the underwriter notice, so that he may take possession of the wreck or salvage, or whatever remains. All these things, it appears to me, depend very much more upon the evidence than upon difficult problems of law.

A vessel is abandoned as totally lost and is again found taking the sea and performing voyages as effectually as before the accident or peril through which she has passed. The evidence of her repair, it may be at a slight cost,—possibly her restoration without any expense for repair whatever, (for that was the case in *Berteaux* v. *Cobequid Ins. Co.*, but for a doubtful question, it is said, as to the weight of evidence, or whether the presiding Judge was satisfied with the verdict,)—and of her efficiently taking the sea cannot be excluded in the controversy, though it is by no means conclusive.

The question in such a case is, whether, at the time of the abandonment, and previous to notice—where notice is not excused—total destruction was rendered highly probable, and recovery, though not utterly hopeless, was exceedingly doubtful, or in other words, whether annihilation, though not inevitable, was not highly imminent. If there is evidence of that,—unless for some reason that evidence is unsatisfactory,—the owner must recover though the ship escapes entirely uninjured. That may be called an extreme case, but it is a case, I think, within the law. I am not referring to a case

necessarily of sale; there may or may not be a sale. If all reasonable hope of saving the subject insured be gone during an existing peril,—if it becomes apparent in the case of a ship that her usefulness as a ship is gone beyond any reasonable hope of restoration, then the owner may abandon her and recover as for a total loss. Evidence of the subsequent easy restoration of the ship,—she may or not have passed to a new owner by sale,—in some cases would be very strong, it might be irresistible evidence for a jury to defeat the contention of imminent peril, but it would only be evidence to be weighed in the case. I am assuming that the loss,—there is no "loss by sale,"—was by a peril insured against, because unless diligence, fidelity and good judgment of the master appear, the loss may not be said to be by peril of the sea. So that diligence, fidelity and good judgment must appear in the evidence on the part of the master as agent of the owner—the absence of which will bind the owner down to the moment of the loss,—to the period when no hope of restoration remains, and what was before a ship becomes no longer a ship—becomes worthless as a ship; all these are necessary qualities to be exercised by the master to entitle the owner to say that his ship was entirely lost by a peril insured against. If the diligence, fidelity and sound judgment of the master and the imminent danger have not been satisfactorily disclosed on the trial, the verdict for the owner, as in ordinary cases for want of evidence, is liable to be disturbed. Then if at any particular time whilst the danger continues—everything being done that can reasonably be effected to extricate the ship from the peril—the period arrives when it may be said that no reasonable hope remains, and the owner becomes aware of this state of things, he must then at once abandon and give notice to the underwriters. If, after receiving such information, he delays giving notice, he delays at his peril, and, though the work of destruction goes on until a mere wreck, or it may be until no trace of the wreck—that is nothing of value—remain, he may fail to recover for a total loss by reason of the absence of notice. If, during the time of danger or destruction, it should become apparent at any period that the cost of repairing the damage then done would exceed the value, it is the same thing, I think, as if the peril of destruction

or complete annihilation should become highly imminent; notice in either case, unless excused, must be given, in order that the underwriter may interpose. The underwriter cannot interfere till he receives notice. While abandonment is a part of every contract of indemnity, notice of abandonment is peculiar to contracts of insurance, and the agreement that notice shall be given is said to be a part of the contract, and cannot be dispensed with, except where there is nothing remaining of the subject matter of insurance to abandon, (for the proceeds of sale may be abandoned at the time of claiming indemnity,) or where it is impossible to forward a notice.

If the time is ripe for giving notice of abandonment, and the notice be given, it matters not to the owner whether the abandonment be accepted; he is safe to recover for a total loss. After that the master is no longer the agent of the owner. If, however, it should turn out that the vessel was neither in a hopeless condition of peril of total destruction, nor damaged so as not to be worth repairing, down to the time of notice of abandonment, the owner must fail to recover for a total loss, and the master continues to be the agent of the owner, and the abandonment is of no effect. I think, however, if the master still continues to act vigilantly in good faith, and without mistaken judgment, and fails to save the ship and it becomes totally lost afterwards, by being placed in imminent peril of destruction, or being destroyed or damaged, so as no longer to be useful as a ship, the owner can recover. He cannot recover upon the old notice of abandonment, but must give new notice after the new state of facts, unless he is excused, or nothing remains under the new state of facts.

If, when the period arrives in which no hope whatever remains of saving or restoring the vessel, and there is imminent danger of immediate total destruction, a sale takes place, and there is not time for the master to communicate with the owner, or for the owner to give notice to the underwriter, I understand the owner will be excused from giving notice, upon the authority of the numerous cases where the owner has recovered for a total loss without giving notice, the proceeds of sale being abandoned when the claim is made. But the mere fact of what is called a justifiable sale is, I

should think, no excuse for dispensing with notice of abandonment. In almost all cases of sale by the master, the owner becomes informed of the accident or loss which leads to the sale and the sale itself at the same time, and then the owner is excused. The electric telegraph, though it has altered the nature of the facts in many cases where the principles of law are to be applied to what is called a justifiable sale, has not altered the law itself. And the cases will more frequently occur where notice is required and cannot be dispensed with, and fewer cases will happen of sale by the master.

I have so far in discussing the question,—not without a full appreciation of the responsibility,—ignored all artificial distinction between a *constructive* and an *absolute* total loss. And whether such cases can or cannot be invariably considered without drawing such distinction, I think what has been said may be so applied as to prevent us from falling into error in determining whether this verdict shall be disturbed.

Everything that a verdict can settle has been settled in this case against the underwriters and in favor of the insured; and here, where the finding is on the evidence by a judge without a jury, nothing can avail the defendant by way of mistake in the law as in the case of misdirection. In *Cobequid Marine Insurance Co.* v. *Berteaux*, a case somewhat similar in some respects to this, decided on appeal by the Judicial Committee of the Privy Council, it was suggested, though perhaps not so decided as to become a binding rule, that where the verdict in favor of the insured was attacked, the case, as made by the plaintiffs, should alone be looked at, because the Court could not be aware that all the witnesses on the part of the defendant were not disbelieved on the trial. In the case now discussed, there may be some reason, on examining the minutes of trial, for discrediting evidence on the part of the defence. Then the underwriters here are in a much worse position than in that case, because there it was assumed that the Judge who tried the cause was not satisfied with the verdict. The appeal was sustained, but without costs. In a case determined in the same tribunal,—a case of sale by the master,—on an appeal from Australia three years before, inasmuch as the Chief Justice of the Colony had reported that he was satisfied with the verdict, much turned upon that

in the Judicial Committee of the Privy Council, and there the verdict was sustained and the appeal dismissed with costs. *The Australasian St. Nav. Co.* v. *Morse*, L. R., 4 P. C. 222.

The vessel in question here was stranded on a very dangerous part of the coast of this Province, exposed to the Atlantic Ocean, in perhaps the very worst season of the year when the harbor at the mouth of which she lay was for four miles from the town (Shelburne) frozen over, and the hull, rigging and hawser of the insured vessel were encumbered with ice formed from the waves and spray of the sea.

The vessel was bound to Boston, and was approaching Shelburne in stress of weather, having encountered heavy gales, intense cold, and head winds. Owing to the parting of some of her steering apparatus, she struck on the rocks and suddenly became stranded early in the morning at nearly high water, on Saturday, the 15th of February. Notice of abandonment was given in Halifax, on behalf of the owners, on Monday evening following, and she was sold on Tuesday.

On the argument it was urged that no sale could take place in a home port, or at any rate no sale is justifiable in a case like this, where the master was in communication with the owners, who were either present or had an opportunity of being present. In that way it was attempted to cut off the right of recovery on the ground of what is usually called a justifiable sale, upon which plaintiff's counsel relied, and it was ingeniously suggested, on behalf of defendants, that the notice of abandonment was beside the question, and the argument on both sides was conducted without much reference to or reliance on that notice, which I think the most essential feature in this case. The sale on the contrary, I think, has very little, if anything, to do with the real point in controversy. And in that respect there seemed to be some misapprehension throughout the argument, of the real state of the law as applicable to this case. Here the master, owners and underwriters were within reach and call, and in actual communication. The master communicated with the owners before selling, and to the notice of abandonment given on Monday evening, the 17th, the underwriters the next day replied, declining to accept it, without further particulars, and the vessel was sold on Tuesday at 2 o'clock, p. m. The case

is peculiar, and I think the underwriters would have been liable if no sale had ever taken place after notice.

Those striking passages relied on in the text books, respecting the sale of the ship by the master have almost all relation to cases where the owner and underwriter cannot be readily communicated with, and where the master acts for the benefit of all who may be interested ; and, while all that is said about a sound discretion, caution and vigilance, and the utmost good faith in the master may apply in one sense here, it does not, I think, apply in relation to the sale. Where notice of abandonment is once properly given at the proper time all responsibility of the owner ceases, and from that moment the master in charge becomes the agent of and, if he sells, sells for the underwriters. This case, therefore, it will be apparent, may, under the evidence and finding here, be considered and determined without any reference to the sale whatever, and just as if no sale had taken place. It is in this view I deem the notice of abandonment essential. In this view if the plaintiff recovers he may recover on the ground that the vessel became a total loss before the notice of abandonment, and the whole controversy is at an end before we reach the period of sale, and without involving any of the particulars after the notice of abandonment, except as evidence to throw light on the period already past.

I suppose, as I have suggested, we may only look at the case presented by the plaintiffs' witnesses. I do not mean to say that where an inference was raised we should not look at the evidence of defendant rebutting that inference. It cannot be said that there are not here to be found conflicting statements. There are nearly always more or less conflicting statements in such cases, especially where much of the evidence is extracted by cross-examination. Sometimes that exists to such an extent as to give great difficulty and sometimes even to render it impossible to say that a main and essential issue is not left as if unsupported. I do not think that is the case here. Here I regard the evidence on the whole as satisfactory, and I cannot say that I would have wished the verdict otherwise.

There is evidence that the tide did not suit to make any effectual attempt to float the vessel on Saturday, and that the

drift ice prevented the master from getting out more than one anchor, and there is evidence that all that could be done, and all that was useful to be done, was done on that day; and on Saturday night she filled with water, and on Sunday, a gale coming on, she was bilged. The tide was ebbing and flowing in her as it did outside, and there was a heavy sea all day, though the day was spent in discharging the cargo. On Monday a winter gale of wind was blowing, with a heavy sea, so that the crew could not remain on board; the sea was breaking over the vessel, and the spars were springing toward each other and the vessel was beating on the rocks and grinding on the bottom, and she gave signs of going to pieces. Her condition was communicated to the owners. The vessel was then stripped and experienced persons thought she lay in a hopeless condition under the effect of an increasing storm. Afterwards, by the aid of a favorable tide and a vessel, which was not available at the time of abandonment, and but for which vessel she would have probably gone to pieces, she was got off and repaired by persons in the vicinity, very likely under favorable and economical circumstances. Even so, it is not very safe to say now whether she was repaired at an expense less than her value when repaired.

It cannot be said, I think, that at the time of notice of abandonment, or on Monday, there is not much evidence that the vessel was in a hopeless condition, that she was in impending danger of being dashed to pieces by the rising gale; that it might very reasonably on that day have been concluded that she was not worth repairing—that she was a mere wreck and no longer of any use as a sea-going vessel, and that the master had done all that could be done. Admitting that there are some expressions in the evidence of plaintiffs' witnesses less favorable to plaintiff's case than the view suggested, can it be said that the weight of evidence preponderates so greatly the other way as to require us to disturb the verdict? That, I suppose, is the real question. And even now, after all is over, do the subsequent events speak unfavourably against the plaintiff? But for the timely and, I think, unlooked for arrival of an American vessel, fitted for the winter fishing, the insured vessel we now know, as far as one can know, must have gone to pieces, or, at any rate, there

is nothing to lead us to a contrary belief against the evidence. And as to the cost of repairs, under the most favorable circumstances, does it appear clear that this vessel was worth the trouble of restoring her to the sea? It is not necessary to say whether if the verdict had been for the defendant it could or could not be disturb on these points. It is sufficient to say that the evidence of the hopelessness of being able to extricate the ship with the means at hand, and also of her extremely shattered condition, and the great improbability of being able to restore her, except at a cost exceeding her value, having been heard on the trial, and having resulted in a finding by the learned Judge who tried the cause, I do not think any sufficient reason appears for opening up these questions and again submitting the facts for another trial. I have examined carefully all the cases bearing on the questions raised at the argument,—though I had occasion recently to examine them in other discussions before this court,—and I am of opinion that we have had no reason presented to us to cause us to be dissatisfied with this verdict, which must rest on the ground that the vessel was totally lost to the owner at the time she was abandoned to the underwriters. And we are all of opinion that this is sufficient to entitle the plaintiff to our judgment.

McKENZIE *v.* McKAY.

(Before McDONALD, SMITH, JAMES and WEATHERBE, *JJ.*)

(Decided January 18th, 1882.)

Appeal demanded from Justice's court.—Request to make an Affidavit.—Malicious refusal of Appeal.

PLAINTIFF brought an action against a Magistrate for maliciously refusing an appeal; but on his direct examination stated merely that he had demanded an appeal, and that nothing further was said. Defendant swore that he did not hear the appeal demanded. Plaintiff's attorney swore that in the defendant's presence he had asked plaintiff if he had not offered to make the affidavit and demanded an appeal, to which plaintiff had replied that he had done so. The jury, in answer to the question whether the Justice had been required to prepare an affidavit said "yes," and in answer to the question whether the Justice had acted with malice replied. "apparently"; and they found a verdict for plaintiff.

A rule being granted the verdict was set aside.

This was an action brought by plaintiff against defendant, a Justice of the Peace, for maliciously refusing an appeal.

The cause was tried at Pictou in October, 1880, before Mr. Justice WEATHERBE. Plaintiff gave evidence as follows:—

The Magistrate said: "I have great doubts about the judgment, but I'll give judgment for plaintiff, and the defendant can appeal." I just said I demanded an appeal. That was all I said. The Magistrate was sitting when he wrote. I demanded an appeal. That was all I said. Afterwards defendant went into a side office. I was on my way to that office afterwards when I was stopped by an execution by Nicholas P. Olding. This is the execution. I was arrested on this execution. I went to the office of the Magistrate. I asked him if he was going to lock me up. I think he said I should have come prepared. I could get little satisfaction. I asked him to send his constable to Pictou, that he could get my bonds, or money, or property. He said the officer could not leave the court, or jail I think it was. He said mine was a hard case, but I had my remedy. I saw him with my attorney who read the law to him. Defendant said my attorney only read part of the law. I was in jail till next morning at nine, when I made an affidavit and took an appeal.

Plaintiff's Attorney gave the following evidence:—I am an Attorney and acted for plaintiff. I was in Court when judgment was delivered. The Magistrate said he gave judgment for plaintiff, and would let defendant appeal. I heard or knew nothing more whatever till I afterwards went into the Magistrate's office with plaintiff. I then told the Justice he had no right to issue execution. In his presence I asked plaintiff if he had not offered to make an affidavit, and demanded an appeal. He said he had. I read the statute, and the Justice told me I did not read all the law. This is all that was said. There was nothing more said.

Defendant's evidence was as follows:—I have been a Justice of the Peace for fifty years. I am eighty-eight years old. The present plaintiff appeared in the suit referred to, and judgment was given against him. He did not demand an appeal that I heard. After he left the Court the plaintiff applied to me for an execution. I gave it. He said he was afraid he would lose his money. I had never seen the man before. Two hours passed after the judgment without my having seen him. I gave the plaintiff no advice or suggestion

in the matter. I gave the constable no instruction or advice. After the issue of execution, McGillivray, the Attorney, came to my office and asked me to withdraw the execution. There was no affidavit made or required to be made. Next morning the defendant brought me the required affidavit and appeal bond. I did not in that case act differently from any other, and had no cause or reason to do so, but only carried out what I then believed to be, and now think is the law.

Cross-examined.—It was a good while after the judgment before I saw the defendant. I said the moment the papers were made I would withdraw. McKenzie left the Court before I did. Paper E. W. is in Cummings' hand-writing. The paper now shown in his hand-writing, or the part now shown to me, is in his hand-writing. (The defendant says he has not his spectacles, and others are presented to him by consent.) This writing now shown to me is my hand-writing. It is not in Cummings' hand-writing. (The paper in his hands is the execution.)

D. R. Cummings, a witness on behalf of the defendant, gave evidence that he was present all the time of the trial before the Justice, and the now plaintiff did not appeal. He was alongside of the Magistrate, and never heard him say that he would appeal, or anything of the kind. He wrote what he did in the execution in the Magistrate's office. He did not leave the Court till he did.

The learned Judge charged the jury as follows:—

I told the jury that it became my duty to instruct them on the law, and I told them that the plaintiff, in my view, had made out no case, and the verdict should be for the defendant. The plaintiff's counsel was not obliged to become non-suited, and as he had asked them for a verdict for plaintiff, I would put to them questions in writing. The case, I thought, was one without difficulty, in so far as it had been discussed. It was the duty of the Justice, after giving judgment, on being required, to issue execution. He had done nothing more than he was bound to do, according to any contention which I could understand made by counsel. An appeal properly taken would stay the issue of an execution, but there must be an affidavit made that the party applying was

dissatisfied with the judgment, and felt aggrieved thereby, and that such appeal was not prosecuted for delay. This, on being made by the party or his agent and filed with the Justice, would stay execution for ten days, when security would still further stay it. The Magistrate, when required to do so, is to make the affidavit. If the present plaintiff had applied to the Magistrate to make out an affidavit for him that he was dissatisfied with the judgment, and felt aggrieved by it, and that his appeal was not for the purpose of delay, the Justice should have made it. There was no dispute as to the fact here. The plaintiff did not pretend to say that he required the Magistrate to make out an affidavit of any kind, nor did he say that he was aggrieved at or dissatisfied with the judgment, and that the appeal he required was not made for delay. All he said was that he demanded an appeal. He swore that he said nothing more at that time. The defendant's evidence supported by Cummings, was that he did not hear even this; but whether they believed this or not, the plaintiff had not made out enough. According to the contention of the plaintiff's counsel, Mr. Henry, he seemed to admit that what plaintiff swore to as to demanding the appeal was not sufficient, but that it was necessary for the jury to find that the Justice had been required to make an affidavit, before the issue of the execution, to award the plaintiff a verdict. I would put that question to them in writing: Was he so required? Counsel had told them that when in the office of the Justice, after the execution had been issued, McGillivray addressed plaintiff, asking him if he had not offered to make an affidavit, and demanded an appeal, and plaintiff had then, not speaking under the obligation of an oath, replied in the affirmative. I instructed the jury that this was not sufficient, and, as the plaintiff had not himself, when under oath, attested to this, (the most important point in the case), but had distinctly and in his direct examination sworn that he demanded an appeal, and said nothing more, he could hardly expect the jury, under their oaths, to say that he had required the Justice to make the affidavit. Moreover, they should consider that we had the evidence of defendant, stating that he did not even hear the demand for an appeal, and the defendant's hearing was obviously defective, unless he was deceiving us on the witness

stand. What they were now by plaintiff asked to find was, not only that plaintiff, before the issue of execution below, demanded an appeal, and required the Justice to make the affidavit required by the Statute, but that the Magistrate, notwithstanding his evidence in Court, heard the application, and acted from malice. As they had heard a long address from plaintiff's counsel, the defendant could not, claiming his right in so clear a case, address them, and as I did not propose to go in detail over the various matters brought to their notice, I would take the liberty of asking them to take the two questions from me in writing, and give me the answers to these, after which they would be at liberty to deliver their verdict.

The questions and the answers of the jury were returned to me by the foreman, and they are appended:

1st Question.—"Was the Justice required to make an affidavit before the issue of execution?"

1st Answer—"Yes."

2nd Question—"Did the Justice act with malice?"

2nd Answer—"Apparently."

The jury returned a verdict for plaintiff and a rule was taken to set the verdict aside.

Henry, Q. C., was called on to answer the point that the Magistrate had not been required to prepare the affidavit for the appeal.

The defendant tacitly admitted that before the execution was put in force he was required to prepare the affidavit.

McDONALD, J.—He swears directly to the contrary.

WEATHERBE, J.—It is only evidence of a conversation from which an inference may be drawn, but there is the defendant's own testimony that no such request was made.

The COURT made absolute the rule for a new trial.

DOBSEN *v.* McDONALD.

(Before McDONALD, JAMES, and WEATHERBE, JJ.)

(Decided January 26th, 1882.)

Appeal in form of rule nisi.

A RULE for an appeal from the ruling of a Judge refusing to allow an examination of an agent in regard to certain matters, under the Absconding Debtors' Act, was taken in the following form:—It is ordered that an appeal be granted from the ruling of the presiding Judge given at the examination, etc., on the grounds, etc., and that a rehearing of said agent be had, unless cause to the contrary be shewn before the Supreme Court *in banco* at Halifax, within the first four days of the next ensuing term.

Appeal dismissed.

This was a summons under the Absconding Debtors' Act to bring in an agent who was believed to have goods of the defendant under his control. The agent admitted having received money on the defendant's account to the amount of $1800. The Judge refused to allow any examination as to the acts of the agent subsequently to the time of the service of the summons, or to allow inspection of items in the agent's books subsequent to that date, and a rule was taken for an appeal. The rule was in the following form:—

It is ordered that an appeal be granted from the ruling of the presiding Judge, given at the examination of William H. Moore, summoned as the agent of the defendant, on the ground, amongst others, that the said Judge decided not to allow any examination by plaintiff of dealings, matters and affairs between defendant and said agent, subsequently to the time of service of the summons on him, or relative to matters growing due subsequently thereto; and not to allow inspection of any items in the books of said agent subsequent to said service and in the account between said agent and defendant produced at the trial; and that a rehearing of said agent be had, notice being given, unless cause to the contrary be shewn before the Supreme Court, *in banco*, at Halifax, within the first four days of the next ensuing term, service hereof being made on said agent or his attorney within ten days from the date hereof.

By the Court,

ALEX. TAYLOR, JR.,

Prothonotary.

Baddeck, 11th June, 1880.

J. J. Ritchie, in support of rule, distinguishes *Heustis* v. *Lynds*, 1 R. & G., 248. (WEATHERBE, J.—I think you would fail under any circumstances under this rule.) MCDONALD, J. —*Heustis* v. *Lynds* is not applicable. There is no decision from which an appeal can be taken. There is nothing to prevent you having a rehearing. WEATHERBE, J.—We cannot do anything with the rule except dismiss it.

Appeal dismissed.

FRASER *v.* FRASER ET AL.

(Before MCDONALD, JAMES and WEATHERBE, JJ.)

(Decided January 27th, 1883.)

Non pros.—Judgment signed by Prothonotary out of term.—Nullity.

AFTER notice of *non pros* a peremptory undertaking was given for the next term at Pictou; but plaintiff failed to try his cause. Defendants' counsel moved for judgment of *non pros*, and the Judge took the papers and reserved his decision. After the Court had closed at Pictou, the Judge was applied to for his decision at another Court, and initialled the rule for judgment, upon which the judgment was signed by the Prothonotary at Pictou. Plaintiff treating the judgment as a nullity, proceeded to the trial, in which defendant took no part.

Held, that the plaintiff could not, under the circumstances, proceed to trial, and the verdict must be set aside.

The action was brought by the plaintiff for goods sold and delivered to the defendants. When the cause had been at issue five terms the defendants' attorney gave notice of *non pros*, after which a peremptory undertaking was given. Subsequently, plaintiff not proceeding to trial, a rule for judgment as of nonsuit was prepared and having been initialled by the Judge was signed by the Prothonotary out of term. Plaintiff, notwithstanding, proceeded to trial and recovered a verdict against one of the defendants, and a rule was granted to set the verdict aside.

The following affidavit was read at the argument:—

I, James McG. Stewart, of Pictou, in the County of Pictou, Barrister, of counsel with the defendants' in the above named cause, make oath and say:

1. That the above cause was commenced by writ of summons and writ of attachment issued on the nineteenth day of September, A. D. 1876.

2. Pleas in the above cause were filed on the sixteenth day of March, A. D. 1877, and the said cause was then at issue.

3. On the tenth day of April, in said year 1877, a writ of commission was issued, at the instance of the defendants herein, to take the evidence of witnesses residing in the United States, and such commission has since been returned, as I am informed and verily believe.

4. At the November Term of this Court, at Pictou, in 1879, a motion was made on behalf of the defendants herein for judgment of *non pros* in this case, and on the said plaintiff's counsel entering into an undertaking on behalf of said plaintiff to try this cause at the next ensuing term of this Honorable Court at Pictou, this cause was passed.

5. At the June Term of this Court, 1880, I made a motion to the Court for judgment of *non pros* herein, and the plaintiff's counsel was heard in opposition to said motion, and Mr. Justice Smith, who then presided at said Court, then stated that he wished to have the papers in the cause, and would give a decision after reading the said papers, and to my knowledge nothing further was done herein by the parties hereto or their counsel or attorneys at said June Term.

6. * * * * *

7. Before the present term of this Court at Pictou commenced, a rule for judgment of *non pros* was filed among the papers in this cause on file at Pictou.

8. When this cause was called at this term, the plaintiff went to trial and recovered a verdict, and the defendants counsel took no part in said trial, and gave as their reason therefor that judgment of *non pros* had already been granted herein.

9. I am informed and verily believe that the defendants' herein have a good defence thereto on the merits.

10. The last June term of this Court was the seventh term at which the cause was at issue.

Sedgewick, Q. C., in support of rule.—The plaintiff had no right to try the cause while this rule was outstanding, giving judgment of nonsuit.

Henry, Q. C., contra.—The rule was a nullity. It was not a rule of the Court, having been signed by the Prothonotary when there was no term of the Court in the County. The Prothonotary had no authority to sign it out of term. Mr. Justice SMITH, who authorized this to be done by initialling the rule at Annapolis, had then no power to give judgment in this cause in which the venue was in Pictou, and the motion made there. (WEATHERBE, J.—It was irregular, but he had jurisdiction over the matter.)

Graham, Q. C., in reply.—(MCDONALD, J.—If Matheson had not been the Prothonotary the rule would have been a nullity beyond question. JAMES, J.—The rule having been initialled by the Judge, you can hardly treat it as a nullity. MCDONALD, J.—If a Judge has authority in the class of cases, though not in the particular case, his act would be voidable, but not void.)

With the motion for judgment of nonsuit outstanding the Court could not permit the party to go to trial at all. In giving notice of trial and going to trial, the parties were throwing themselves open to severe censure, and it would be a mistrial on that ground. A wrong order of Court drawn up by an officer of Court is a good order until amended. *3 Br. & Bing*, 188.

There was a peremptory undertaking, and when such an undertaking is given the other party has judgment, as matter of course, and the party giving the undertaking must move against it. *Tidd's Prac.*, 765.

In England the practice is not to draw up rules at the time, but to draw them up subsequently and date them as of the term.

Henry, Q. C.—The case cited from *3 Br. & Bing.*, 188, is not applicable.

MCDONALD, J.—I think that case is strongly against you, and it conforms entirely with my own view of the law, but it is not necessary to our decision. We are all of opinion, under the circumstances, there being a peremptory undertaking and a motion for *non pros* undecided, the plaintiff ought not to have gone on to trial.

WATSON *v.* HENEY.

(Before McDONALD, C. J., JAMES, WEATHERBE and RIGBY, JJ.)

(Decided February 3rd, 1882.)

Appeal from County Court.—Mis-recital of Judgment in Appeal Bond.—Motion to quash in Appellate Court.—Practice.—Suit on Bail-Bond.—Execution returned before expiration of sixty days.

Plaintiff sued in the County Court on a Bail-Bond given by the three defendants, who pleaded and proved that the execution had been returned before the expiration of the sixty days within which it was made returnable. The County Court Judge held that this was a mere irregularity, not touching the merits, and could not be taken advantage of by plea, and he gave judgment against the three defendants. Defendants appealed, and in the Appeal Bond recited the judgment as a judgment against two of the defendants.

Held, that the appeal was irregular, and that a motion was properly made in this Court to set it aside though the papers had been certified and the bond approved by the County Court Judge.

The defendant, Heney, was arrested on a writ of capias at the suit of the plaintiff, and entered into a bond with sureties, of which the following is a copy :—

Know all men by these presents that we, William R. Heney, merchant, Thomas J. Payne, clerk, and Lorenzo A. Barnaby, all of the City of Halifax, are held and jointly and severally bound unto Joseph Bell, Sheriff of the County of Halifax, in the Province of Nova Scotia, in the sum of one hundred and seventy-seven dollars and fifty cents, to be paid to the said Sheriff, his lawful attorney, heirs, executors, administrators or assigns, for which payment well and truly to be made we jointly and severally bind ourselves, our and each of our executors and administrators firmly by these presents, sealed with our seals, dated the 26th day of April, the forty-third year of the reign of our Sovereign Lady the Queen, and the year of our Lord one thousand eight hundred and eighty.

The condition of this obligation is such that, if the above bounden William R. Heney do appear in the County Court at Halifax within ten days from the date hereof, to answer to the suit of John A. Watson, and in case judgment shall be obtained against the said William R. Heney, if he shall satisfy said judgment, or render himself or be rendered by the said Thomas J. Payne and Lorenzo A. Barnaby into the custody

of the Sheriff of the County of Halifax, then the said obligation to be void.

W. R. HENEY. [L. S.]
LORENZO A. BARNABY. [L. S.]
THOMAS J. PAYNE. [L. S.]

Signed, sealed and delivered in the presence of
OTTO S. WEEKS.

(Endorsed,) JOSEPH BELL.

Judgment was recovered by the plaintiff and an execution issued in the usual form, returnable in sixty days. The execution was returned before the expiration of the sixty days, *non est inventus*. The present action was then brought on the bond, and pleas pleaded. The only question upon which the judgment turned appears in the judgment of the learned Judge of the County Court:

JOHNSTONE, J.—This was an action on a Bail-Bond, given to the Sheriff and assigned, and the sole question at issue is one of practice,—had the execution been issued a sufficient time prior to the bringing of the action.

The execution was issued and handed to the Sheriff 26th June, 1880, and returned by him the 5th July.

By our Practice Act an execution is to be made returnable either in sixty days or the first day of the next succeeding term, but is in no case to be made returnable in less than sixty days, and to fix the bail, it must have lain in the Sheriff's office the last four days. The practice in this case has not been followed; the execution was irregular, as was bringing the action on it against the bail.

The question here arises, how is the irregularity to be taken advantage of. This point, though not mooted at the trial, I have looked into with some care. *Chitty on Pleadings* lays it down that matter founded solely on the rules or practice of a court of law, or being mere irregularity, is not in general pleadable; and I gather from the numerous cases I have looked into that matters that go to the very merits of the case are pleadable, but that matters of practice are only the subject of motions to set aside pleadings for irregularities. See *1 D. & R.*, 50; *5 Moore*, 182, &c., and *2 Tidd*, 1128.

If the writ be merely irregular, as if it has not lain four days in a Sheriff's office, or has been made returnable a day out of term, bail cannot take advantage of the irregularity by pleading. *7 B. & C.*, 80. Bail may plead that no *capias ad satisfaciendum* was sued out and returned against the principal; or that the *venire* was laid in a wrong county may be pleadable as going to the merits; but mere irregularities such as a suing out *ca. sa.* after a year without a *scire facias* to revive judgment; or if made returnable a day out of term or if it had not lain four days in Sheriff's office, cannot be taken advantage of by pleading, though it may be made the subject of motion. *Petersdorff on Bail*, 366.

The matter here is merely an irregularity as contrary to the practice of the Court, and does not touch the merits, and connot therefore be pleaded, and the plaintiff is consequently entited to recover.

Judgment for plaintiff for penalty of bond, $177.58.

From this judgment the defendants appealed, and the argument took place January 16th, 1882. The bond for the appeal was in the following form:—

Know all men by these presents, that we, Lorenzo A. Barnaby, of the City and County of Halifax, in the Province of Nova Scotia, clerk, Thomas J. Payne, of the same place, bookkeeper, William McFatridge, of the same place, merchant, and Arthur W. Redden, of the same place, merchant, are jointly and severally held and firmly bound to John A. Watson, of Saint John, New Brunswick, in the sum of three hundred and thirty-six dollars and twenty-six cents, lawful money of Canada, to be paid to the said John A. Watson, or his certain attorney, administrators or assigns, for which payment to be made we bind ourselves and each and every of us in the whole, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this ninth day of December, A. D. 1880.

Whereas, in an action in the County Court in Halifax, tried herein, the said John A. Watson recovered judgment against the above-named Lorenzo A. Barnaby and Thomas J.

Payne for the sum of one hundred and seventy-six dollars and twenty-six cents;

And whereas, the said Lorenzo A. Barnaby and Thomas J. Payne being dissatisfied with the said judgment obtained from said Court, a rule whereby they were granted an appeal from the said judgment to the Supreme Court, upon their filing a bond to be approved of by the Judge of the said Court, as security for the payment of the amount of the said judgment and costs;

And whereas, the said Lorenzo A. Barnaby and Thomas J. Payne have agreed to give such security to respond the judgment;

Now the condition of this obligation is such that if the above bounden Lorenzo A. Barnaby, Thomas J. Payne, William McFatridge and Arthur W. Redden, any or either of them, shall pay unto the said John A. Watson, his executors, administrators or assigns, the costs of the said appeal as the said Court of Appeal shall order, and shall also in case the said appeal shall be dismissed, pay to the said John A. Watson, his executors, administrators or assigns, the said sum of one hundred and seventy-six dollars and twenty-six cents, then this obligation shall be void, otherwise shall be and remain in full force and virtue.

(Sgd.) LORENZO A. BARNABY. [L. S.]
(Sgd.) THOMAS J. PAYNE. [L. S.]
(Sgd.) WM. MCFATRIDGE. [L. S.]
(Sgd.) A. W. REDDEN. [L. S.]

Signed, sealed and delivered by the above-named Lorenzo A. Barnaby, Thomas J. Payne, Wm. McFatridge and Arthur W. Redden, in presence of

JOHN MENGER.

Approved,

J. W. JOHNSTON.

The judgment below having been given against three defendants, a rule *nisi* was taken to set aside the appeal as irregular, and the argument of this objection took place at the same time as the argument of the main question.

Weeks, in support of appeal.—The cases relied upon by the Judge below turned upon a question of strict practice. This is not such a question. Under our Practice Act, section 264, no execution can be made returnable within sixty days. The sheriff must, therefore, hold the execution for the sixty days. The return here is a mere nullity. Cites *16 East.*, 39. This case was decided anterior to the case relied on by the Judge below, and is sustained in *Goldney* v. *Laperte*, cited in 2 Bing., N. C., 456, decided in 1836. This case goes fully into the matter. A Court of Error would not take advantage of mere questions of practice of the inferior court. Where the bail have a specific time within which to render, and the *sci. fa.* is issued before the expiry of that time, it is matter of substance, and the party impeaching the process has two courses, either of which he may adopt, either by plea or by motion. (McDONALD, C. J.—Have you a plea to cover your contention?) The sufficiency of the plea was not disputed.

McCoy, Q. C.—The preliminary objection we wish to raise is to the bond for appeal. There were three defendants, each of whom appeared. The judgment is against the three. The bond for appeal is given by Barnaby and Payne, two of the defendants, to respond a judgment against them, the fact being that there is no such judgment.

Weeks.—The bond has been approved by the Judge and the appeal is perfect. The motion should be made in the Court below. *County Court Act*, section 103, chapter 2, Acts of 1880.

McCoy, Q.C.—We must move in this Court to show that this Court has no jurisdiction, because the bond contemplated by the statute has not been filed. This Court will assume jurisdiction for the purpose of dismissing the appeal. It would not be possible for me to move below, as the cause and all the papers are removed to this Court. If the bond is imperfect this Court has no jurisdiction at all. (The COURT directed counsel to proceed on the main question.) There is only one point in the case. I don't agree that there is a distinction between the statute and the rules of Court. In *1 M. & W.*, p. 58, it was held that the irregularity could not be pleaded, but must be made the subject of a motion. We have

a statute regulating the practice and enabling the Court to make rules. The moment the rules are so made they have the same effect as if they were part of the statute itself. In the case in *16 East.* there was a capias issued, but it was issued into the wrong county, and was a nullity. Even if the writ in this case was a nullity, a motion would have to be made to set it aside; but it was only an irregularity. *10 East.*, 73. We are bound by the English practice as regards bail, because we have no statute. *Cowper*, 18. Only one levy can be made on the same execution. Mere practice is not pleadable. *7 B. & L.*, 804; *1 D. & Ry.*, 50. In England executions were made returnable as they are here, and it was held mere irregularity. The fourth plea is bad because it does not set out the time the bail had to render Heney before the writ was issued. It is not a complete answer. *1 Tidd*, 281, 282, 283, gives the English practice in regard to fixing bail. *2 Allen's N. B. Reps.*, 359.

Weeks, in reply.—The cases cited are overruled by *Goldney* v. *Laperte*, already cited. I admit that where we have not legislated the English practice must prevail. That practice is beyond question that no writ can issue until the execution has been returned. *Ch. Arch.*, 874; *8 T. R.*, 628. Our statute fixes the time within which executions are to be returned. If not, an execution may be issued in the morning, returned at once, and an action commenced against the bail on the same day (RIGBY, J.—There would be no notice to the bail at all. In England there must be at least four days' notice.) *10 Bing.*, 434; *Lush's Practice*, 741.

MCDONALD, C. J., now, (February 3rd, 1882), delivered the judgment of the Court:—

When this case was called for argument, the counsel for plaintiff called the attention of the Court to a rule *nisi* obtained by him on affidavit on the 14th September, 1880, to set the appeal aside on the ground that the bond given as security for the appeal was irregular and insufficient, and stated that the Court had directed that this rule *nisi* should be argued and disposed of on the hearing of the cause. The bond is undoubtedly insufficient, as it misrecites the judgment appealed from.

The judgment appealed from was at the suit of *Watson* v. *Heney, Payne & Barnaby*, while the bond purports to be made in a judgment of *Watson* v. *Payne and Barnaby* only. "An appeal is void without an approved bond or recognizance by the appellant, so where a recognizance misrecites the judgment, or where it is not in proper form, it may be dismissed. In case of a defective appeal bond or recognizance, the appeal may be dismissed, and the court may refuse to proceed for want of jurisdiction if they become satisfied during the trial that the appeal bond was executed without authority." *Hilliard on New Trial*, 749. See also *Hilliard, Ed.* 1866, page 611, section 146; page 613, section 153; page 601, section 106; page 585, section 61. See also *Stone* v. *Dean*, El. Bl. & El., 502.

The defendants object that the application should have been to the Court below, and that in any case the defect is covered by the certificate of the Judge and by his certificate of approval endorsed upon the bond. Section 100 of chapter 2 of the Acts of 1880 is as follows; "If the Judge shall refuse to grant such rule, or order, (for appeal), and the party desiring such appeal shall, within eight days from the day on which the decision, &c., appealed from shall have been made, file a bond to the other party in sufficient sureties in such *reasonable amount as the Judge shall direct to respond the judgment*, on such appeal no judgment shall be entered up, but the rule for appeal shall pass;" and section 103 provides that "upon such appeal *being perfected*, and the bond, where a bond is given, being by him *approved*, the judge shall certify to the Supreme Court under his hand the pleadings in the cause," and other papers specified in the Act, not including the bond as one of the papers to be so certified. The "approval of the Judge," referred to in this section, could extend, I apprehend, only to the amount to be secured by the bond, to be fixed by him as required in section 100, or at most to the further approval of the sureties offered. Lord CAMPBELL, in *Dean* v. *Stone*, says; "It is no part of the functions of the Judge of the County Court to see that the security is given in due time," nor can it be supposed to be a part of his functions to see that the bond is properly drawn or executed, or that it embodies the

recitals and provisions necessary to make it a valid security. Until a sufficient and valid bond be filed, the Judge below cannot grant the certificate required by the statute, and without that certificate this Court, I think, has no jurisdiction to hear the appeal. The main enquiry is, can the application be made to this Court, or should the Court below have been applied to to quash or amend the proceedings. *Stone* v. *Dean*, already referred to, was an appeal from the County Court in Derbyshire. The statute *13 & 14 Vic.*, chapter 61, section 14, giving an appeal from the County Court, makes it a condition that security for costs should be given within ten days after the judgment complained of. On the appeal being called for hearing, the counsel for the appellant moved, *on affidavit*, that the appeal be dismissed, on the ground that the bond had not been filed within the time prescribed by the statute, and after argument the appeal was dismissed. I may add that the English statute requires the bond to be approved by the clerk of the Court, and it would appear to differ from our statute, inasmuch as the former makes the filing of the bond a condition precedent to perfecting the appeal, while the words of section 103 of our statute would appear to indicate that the appeal is perfected without filing the bond, but the filing of the bond is clearly made a condition precedent to granting the certificate which transmits the cause to this Court, and gives it jurisdiction. *Daniels* v. *Charsley*, 11 C. B., 739, also appears to sustain the authority of the Court of Appeal to quash for irregularity or invalidity of the proceedings below necessary to perfect the appeal to the Appellate Court.

The practice of this Court, so far as I can gather that practice from the reports, appears to have been invariably in accordance with the English practice, as above stated. See *Pope* v. *Pictou Steamboat Co.*, 2 Oldright, 177, (note); *Mackay* v. *Mackay*, Thomson's Reps., 75, although in this case, which was an appeal from a Justice's Court, the distinction may be made that the statute required the Bond to be transmitted to this Court with the other papers in the cause. See also *Woodill* v. *LeCras*, 1 R. & G., 7, where Mr. Justice JAMES, delivering the opinion of Court, and referring to the appellant's contention that the motion to set aside the appeal should have been made to the Judge of the inferior Court,

said: "It appears to me there can be no doubt that a superior Court, in the exercise of its inherent, general power of reviewing the decisions of inferior courts, can rescind or set aside any proceeding of an inferior Court under its jurisdiction." See also *1 R. & C.*, 166; *1 R. & C.*, 484; and in *Freeman* v. *Moran*, 3 R. & C., 166, the appeal was dismissed because the papers were not certified by the Judge,—a requirement of the statute not more imperative, I imagine, to give this Court jurisdiction than filing a valid bond.

I think, therefore, that the motion is regularly made, that the objection to the bond must prevail, and the rule *nisi* to quash the appeal be made absolute with costs. I regret the necessity of coming to this conclusion, because, on the merits, I have not been able to arrive at the same conclusion as the Judge below.

JAMES, J.—I think we all concur in the judgment that the appeal is irregular.

WEATHERBE, J.—I concur in the opinion of the learned Chief Justice, and do not think it necessary to add anything to what he has said.

CREIGHTON, ASSIGNEE, *v.* MERCHANTS' BANK ET AL.

(Before McDONALD, C. J., JAMES, WEATHERBE and RIGBY, *JJ.*)

(Decided February 13th, 1882.)

Contemplation of Insolvency.—Section 133, Insolvent Act of 1875.

The insolvent, T. J. B., being indebted to the Merchants' Bank, made an arrangement in pursuance of which he addressed a letter to the Accountant of the Railway Department on October 22, 1878, instructing them to send any cheque coming to him from the Department to the care of Maclean, Cashier of the Bank. The Cashier received the letter, which was addressed to the insolvent, care of Merchants' Bank, and having removed the cheque, which he endorsed, "T. J. B,, per George Maclean, agent for Merchants' Bank, guaranteed," &c., drew the money without authority from the insolvent, and refused to pay it over. At the time of the arrangement in 1878, T. J. B. was in insolvent circumstances, with notes lying overdue at the Merchants' Bank, and judgments recorded against him.

Held, that the arrangement was made in contemplation of insolvency, and was within the provisions of section 133 of the Act of 1875, and that the assignee was entitled to the full amount received by the defendant Bank, with costs.

This was an action brought in Equity by Creighton, the Assignee of Thomas Bentley, against the Merchants' Bank and George Maclean, to recover a sum of money obtained by

Maclean, the agent and cashier of the defendant Bank, from the Bank of Montreal, on a cheque drawn in favor of Bentley or order, in payment of money due him on account of work done by him on the Intercolonial Railway. There was evidence that Bentley was indebted to the Merchants' Bank in a considerable sum on promissory notes, some of which were two years overdue. He agreed with the Bank that they should receive a portion of some moneys coming to him on account of work done on the Intercolonial Railway, and addressed a letter to Mr. Foote, the official through whom the money was to come, requesting him to send any cheque coming to him to the care of Maclean. The cheque came in a letter addressed to Bentley, care of Maclean, and was removed by the latter from the letter in which it was enclosed, and taken to the Bank of Montreal, and payment obtained on endorsing Bentley's name on the note, together with a guarantee. The Judge in Equity made a decree in the plaintiff's favor for the balance of the cheque, interest and costs over and above the sum of $300, which sum he thought the Bank entitled to retain under the agreement made by them with Bentley. See *Ritchie's Eq. Dec.*, p. 438.

The plaintiff appealed from this decision on the following grounds:—

1st. Because the said Thomas J. Bentley, at the time he made the agreement to pay said Bank the sum of three hundred dollars out of said cheque, was unable to meet his engagements, and was insolvent within the true intent and meaning of said *Insolvent Act;* and the said defendants knew or had probable cause for knowing or believing, that the said Bentley was so unable to meet his engagements, and was insolvent.

2nd. Because the said agreement was made in contemplation of insolvency, and the same was made with intent to defraud the creditors of said insolvent, and the same was fraudulent, and because the creditors of said insolvent were and are injured, obstructed or delayed by reason of the said contract.

3rd. Because the said agreement was in fact and effect an unjust preference over the other creditors of said insolvent, and the said agreement and the other acts of said insolvent in

regard thereto, were made and done with intent fraudulently to impede, obstruct, or delay his creditors in their remedies against him; or with intent to defraud his creditors or some of them, and was so made, done and intended, with the knowledge of defendants.

4th. Because, for the reasons stated in the three next preceding grounds, the said agreement and payment, and the receipt and retention of said money, the proceeds of said cheque, was wrongful, illegal and fraudulent, and contrary to the provisions of said Act, and especially of sections 130, 132 and 133.

5th. Because the learned Judge erred in holding that there was no section of the *Insolvent Act* applicable to this case as regards said three hundred dollars, and that to entitle plaintiff to recover said sum of three hundred dollars he must show that such payment was made within thirty days of the issue of a writ of attachment against said insolvent.

6th. Because, the defendants having got possession of said cheque by virtue only of an agreement or contract void, or, at all events, voidable under the provisions of said *Insolvent Act*, and in contravention thereof, and having obtained the proceeds of said cheque by means of a false and fraudulent endorsement of the insolvent's name thereon, the defendants are not entitled to hold said sum of three hundred dollars, nor any part thereof.

7th. Because the right, if any, which defendants had to said sum of three hundred dollars depended solely and entirely upon said alleged agreement, which, for the reasons alleged and facts in proof and in view of the foregoing grounds of appeal, was and is fraudulent, null and void.

8th. Because the said agreement was made in contemplation of insolvency.

9th. Because the said Bank having obtained said money by means of the fraud and misconduct of the other defendant, their cashier, in opening said insolvent's letter and endorsing the name of said inselvent upon said cheque, have no right or title thereto, and cannot in equity retain the same.

(Sgd.) W. H. CREIGHTON,
By N. H. Meagher, his Attorney.

N. H. MEAGHER,
Attorney of Plaintiff.

I hereby certify that I am counsel in this cause for the above-named plaintiff; that in my judgment there is reasonable cause of appeal in the above cause from said judgment, so far as said sum of three hundred dollars is concerned.

(Sgd.) JNO. S. D. THOMPSON.

Dated Halifax, 12th July, A. D. 1880.

Meagher, Q. C., in support of appeal.—(McDONALD, C. J.—If Bentley was insolvent at the time of the agreement, I don't see what right the defendants would have to obtain any part of it. RIGBY, J.—If the money was improperly obtained from the Bank of Montreal, would not they be liable to an action?) I think they might. (RIGBY, J.—If you admit the money was properly obtained you cannot recover. If not, it was the money of the Bank of Montreal, and you cannot recover against the defendant. I would have brought trover against the Merchants' Bank for the note, or sued the Bank of Montreal for the money.) The right of the Merchants Bank to retain the money depends on the agreement made with Maclean. If Bentley made an agreement which would be a fraudulent preference within the *Insolvent Act*, section 130, it was void. If there was a payment it would be different, as the thirty days had elapsed, but there was nothing that could be construed as a payment. Section 130 says that contracts made under the circumstances referred to are presumed to be void. Section 133 refers to property pledged or agreed to be pledged as security or by way of payment, which are to be null and void, and if made within thirty days are *prima facie* in contravention of the Act. As to the meaning of "payments" see *Abbott's Law Dict.*, vol. 2, p. 287.

Ritchie, Q. C., contra.—The minute it is admitted that we received the money, we received it as a payment by Bentley. None of the clauses of the Act cited refer to this case. There is no application here to set aside a contract under section 130. There is no proof that this was done to obstruct or impede creditors within the 132nd section. There is no evidence that it was done in contemplation of insolvency within the 133rd section. Then it must be so made within the knowledge of the other party.

Attorney-General, in reply.—Apart altogether from the invalidating clauses of the *Insolvent Act*, our bill shows that Bentley was entitled to a cheque payable to his order; that he made an assignment, and that the assignee was deprived of the cheque by a fraudulent endorsement. The bill then prays that the endorsement be set aside. I want to establish this to show that we have a good bill. (RIGBY, J.—I don't think that is disputed.) The words subject matter in the section must apply to the matter itself or its proceeds, else the intentions of the Act would be defeated. We ask to have the subject matter back, because we ask to have the act annulled by which it passed out of the hands of the Bank. We need not pray for a decree to set a fraudulent contract aside because the statute declares it to be void. Bentley, according to Maclean, said he had property, but could not realize. That was an open confession of bankruptcy. We set out in our bill that the defendants obtained the money by means of a fraudulent endorsement. If the defendants had then set up the agreement we could have replied fraud under the statute. The only answer to our bill set up is an express authority to draw the money, which is disproved. As to Bentley's right to sustain an action, cites *Story's Eq. Jur.*, section 187; *Kerr on Fraud & Mistake*, 46, 47, 378. As to the extent of the right of assignee to sue, *Insolvent Act*, section 39.

RIGBY, J., now, (February, 1883), delivered the judgment of the Court:—

Thomas J. Bentley, being a creditor of the Intercolonial Railway department, and indebted to the Merchants' Bank of Halifax, made an arrangement with the latter, in pursuance of which he, on the 22nd of October, 1878, addressed a letter to the accountant of the railway, requesting him to send to the care of the defendant, Maclean, cashier of the bank, any cheque coming to him, Bentley, from the department. In compliance with this request a cheque for the sum of $691.76, payable to the order of Bentley, and enclosed in a letter addressed to him, to the care of the bank, was received by the latter, and having been thus endorsed by their cashier: —"Thomas J. Bentley, per George Maclean, agent for Merchants' Bank of Halifax. Guaranteed. George Maclean,

cashier,"—the money therefor was received by the bank from the Bank of Montreal on the 9th of November, 1878, and placed to the credit of Bentley, leaving him still indebted to it. A writ of attachment having been issued against Bentley on the 18th January, 1879, under the *Insolvent Act of 1875*, the plaintiff duly became the assignee of his estate and commenced this action on the Equity side of this Court to recover from the defendant bank the amount of the cheque in question, alleging that the letter containing the cheque had been wrongfully opened by it or its agent, and that the cheque had been wrongfully, fraudulently, and improperly endorsed by its said agent, and without authority, and that it had obtained said money by means of fraud and fraudulent conduct, and by fraudulently representing to the Bank of Montreal that the defendant bank was the lawful holder and had the right to endorse said cheque and to receive said money. It is also alleged in plaintiff's bill that at the time of the receipt of said money by defendant bank, Bently was, and long previously thereto, had been insolvent, within the meaning of said *Insolvent Act*, and said bank, in the knowledge of that fact, procured said acts to be done with the view of securing payment of a debt due to it by the said insolvent, and that the same were done in fraud of the insolvent and of his creditors, and that thereby said bank would obtain an unjust preference over the other creditors of the insolvent.

Defendants, by their answer, deny any fraud or wrongful or improper conduct in relation to the letter or cheque, or that the bank thereby obtained any unjust preference over the other creditors of Bentley. They allege that in January, 1876, the said insolvent being indebted to the bank in the sum of about $1000, mortgaged to them a lot of pitch pine spars of great value, and then exhibited a statement of his affairs, which defendants believed to be substantially correct, in which his assets were shewn to be $12,980 and his debts only $6083, and subsequently at different times up to the 9th of November, 1878, represented that his assets were more than sufficient to pay his debts, and they had no reason to believe him insolvent; that the cheque in question was sent to the bank by virtue of an arrangement that said Maclean,

the cashier, was to get it cashed, deduct $350 out of it on account of Bentley's indebtedness to the bank, and pay him the balance; that after the bank had received the cheque it learned that Bentley had disposed of the spars which had been mortgaged to the bank, and applied the proceeds to other uses, and it then informed him it would not give up the cheque; that Bentley admitted the bank's right to retain the cheque, and in order to get possession of it promised to give it certain endorsed promissory notes which, however, he failed to do, and after waiting a reasonable time it cashed the cheque and credited the proceeds to Bentley.

The money for the cheque in question could only be received from the Bank of Montreal upon the faith of Maclean's representation that he had authority from Bentley, as his agent, to endorse the cheque for that purpose; but the evidence fails to establish any such authority.

The defendant bank was undoubtedly entitled to retain the cheque until it had received the sum which Bentley had promised to pay to it from the proceeds, assuming that the provisions of the *Insolvent Act* did not intervene, and for this the bank had a lien, which could have been enforced on the Equity side of this Court. But the endorsement of the cheque and the receipt of the money were. under the circumstances, wrongful acts, and, in the eye of the law, fraudulent. There can be no doubt, after a perusal of the evidence, that long before any arrangement was made between the bank and Bentley in relation to the cheque, the latter was insolvent within the meaning of the act, and when he engaged to deposit the cheque with the bank he ought to have known that in all probability his estate would, before long, be placed in liquidation, that result being then apparently inevitable.

In January, '76, when the bank got security from Bentley on the spars, its claim against him was for three promissory notes of his, which it held dishonoured. The last of these became due October 25th, 1875, and nothing had been paid upon them up to the time it received the cheque.

Bentley proves that in the summer and autumn of 1878 several judgments had been recovered against him, upon which executions were outstanding, and which have not yet been paid, and that at any time during that year if his creditors,—to use

his own language,—came down upon him he would have to close up, and that subsequently to October of that year his affairs did not improve financially. Thomas Bayne gives evidence corroborative of Bentley's financial embarrassment, and proves that in 1875, he did not, and he believes could not, meet his engagements, and that notes of Bentley's held by the witness since that year dishonoured, have not yet been paid. The insolvent's sworn schedule of assets and liabilities filed after the issue of the attachment, exhibits the liabilities to amount of $11,778, which the assignee states have since been supplemented by other claims exceeding $2,000, the assets put down in the schedule at $3,061.78 the assignee states have turned out less and that without the claim involved in this suit the estate will not pay any dividend.

The learned Judge in Equity, by appeal from whose judgment this matter now comes before us, finds that Maclean had no right to open the letter or endorse the cheque, and after proceeding to consider whether the receipt of the money under the circumstances was in contravention of the *Insolvent Act*, and evidently considering such receipt in the light of a payment, and as section 134 of the act would be the only one applicable to payments made by a debtor under such circumstances, decides, that as the payment in question was not made within thirty days before the issue of the attachment, it does not come within the terms of that section, and that the bank is entitled to retain $300 out of the amount of the cheque received by them with interest. I regret to say that I am unable to arrive at a similar conclusion. It is not consistent with principles of Equity that the bank should be permitted to take advantage of their own wrongful act, and, having improperly obtained possession of this money, successfully claim to retain it as a payment on account of Bentley's indebtedness.

Plaintiff invoked the aid of the Equity Court in consequence of the alleged fraud of defendants, and not admitting that any portion of the proceeds of the cheque had been paid to the bank by Bentley, and the evidence establishes that the contract between the latter and the bank only entitled it to hold the cheque for the lien, to which I have already referred.

I am of opinion that the reasonable conclusion from the evidence is, that this case is within the provisions of section 133 of the *Insolvent Act*; that the cheque was pledged to the defendant bank by Bentley in contemplation of insolvency by way of security for payment to it of the sum which it was agreed it was to receive out of it, and that, as the bank will thereby obtain an unjust preference over the other creditors of Bentley, such contract is null and void. I am also of opinion that the bank abandoned and lost the lien which they had acquired by the possession of the cheque, in consequence of the improper and wrongful acts to which I have referred, and upon that ground alone the plaintiff is entitled to a decree for the full amount received by the bank, with interest and costs.

McDONALD, J. J., and WEATHERBE, J., concurred in this opinion.

JAMES, J.—I had, on investigating this case after the argument, a good deal of doubt whether the receipt of the amount of the cheque by defendants was not to be considered, under the circumstances of this case, as a payment under section 134 of the *Insolvent Act of 1875*, instead of a deposit under section 138. In the former case, the payment not having been made within thirty days, would have been protected. In the latter it would have been voidable on proof that it was made in contemplation of insolvency. My doubts have been in some measure dispelled by a perusal of the judgment of my learned brother Rigby, which has just been read. But I am quite satisfied that the Bank lost their lien by attempting to hold the cheque for a larger amount than the amount covered by their lien, and on this point, which was not taken at the argument, nor, as it appears, in the argument before the learned Judge in Equity, I fully concur with the judgment which has been read.

Some question was raised at the argument as to the jurisdiction of the Judge in Equity in this matter, and three grounds were suggested on which that jurisdiction can be defended, viz., 1st, fraud; 2nd, account against agent; and 3rd, discovery, and I consider that on all three, and especially the latter, the jurisdiction attaches. It is a mistaken idea

that the facilities given by recent legislation for the procuring, in proceedings in the common law courts, of evidence not formerly attainable without the aid of a Court of Equity, have had the effect of curtailing in that respect the jurisdiction of the Equity Courts. Formerly the evidence of neither the plaintiff nor defendant could be obtained without the aid of a bill in equity, and, notwithstanding that any party interested in a cause may now be compulsorily required to give evidence, either by *viva voce* examination or by interrogatories, the equity jurisdiction to enter a bill of discovery remains the same as if these statutable facilities had not been provided. No recent statutory amendments of the law of any description have cut down the equity jurisdiction. It remains the same as it was thirty or fifty years ago.

I take the opportunity of making this suggestion because a considerable part of the business with which the common law courts in this Province are flooded, to the great loss and inconvenience of suitors, consists of causes which could be more speedily, often much more effectually, and at least quite as economically decided in the equity branch of the court, with the additional advantage,—a very great advantage, indeed,—of an effective appeal in our own Courts. This case affords, I think, a very good illustration of this remark. We have a Court of Equity which has always been ably presided over, but by no means overburthened by business, while the common law courts are over-crowded to the great inconvenience of the Bench, the Bar and the public, and the Judge in Equity has to be called in to help to get through the common law business. I trust that these brief observations will have the effect, to some extent, of inducing the profession to consider, in commencing their suits or preparing their defences, whether they might not benefit their clients and the public, without injury to their own interests, by availing themselves much more frequently of the principles, practice and wider powers of the Equity branch of the Court, in the very many cases where the two Courts have concurrent jurisdiction. I also hope that what I have suggested may lead to some arrangement whereby the equitable business that comes before us, especially suits where there are equitable pleas, may be transferred to the Judge in Equity, who, from his training and

habits, and his facilities for carrying out his decrees, can do better and fuller justice than is generally supposed in the power of this branch of the the Court in relation to the Equity jurisdiction which by law it is called upon to administer.

IN RE JOHN BAUER.

(Before McDONALD, C. J. and JAMES, WEATHERBE and RIGBY, JJ.)

(Decided February 13th, 1882.)

Definition of "Creditor" in Insolvent Act of 1875 in relation to proceedings for discharge.

On an application to confirm a deed of composition and discharge under the Insolvent Act of 1875, a creditor appeared to oppose the discharge, who had not filed his claim, though he was mentioned in the list annexed to the affidavit accompanying the insolvent's petition, and notice of the application had been sent to him.

Held, that the claimant was a creditor within the meaning of the Act for the purpose of opposing the discharge.

In Re Creighton, 1 R. & G., 211, overruled.

This cause came up for argument on a case stated for the opinion of the Court.

John Bauer having applied for his discharge under the Insolvent Act of 1875, J. Corastine & Co. filed objections and appeared to oppose the discharge. It was objected that they had not filed a claim, and the County Court Judge held that until the claim was filed they had no right to appear to oppose the discharge.

Meagher, Q. C., for appellant.—It was matter of proof to be made at any time during the hearing that the appellants were creditors. It must be shewn by the papers the opposing creditor produces, as by the assignee's certificate, that he is a creditor. (McDONALD, C. J.—Was any evidence offered that J. C. & Co. were creditors?) Yes. We had the affidavit of the insolvent setting out a list of his creditors. (WEATHERBE, J.—That would not be enough to get a dividend; but I suppose your contention is that it would estop the insolvent.) Certainly. The creditor is defined to be a person who has "filed his claim" for certain purposes, but this is not one of those purposes. (WEATHERBE, J.—The law says that every creditor

of every discription shall have the right to appear and oppose the discharge. RIGBY, J.—The creditors who have the right to appear and oppose the discharge must mean the creditors to whom notices are to be mailed.) We admit that under the Act of 1869, section 143, we would not be creditors until the claim was filed; but, by the Act of 1875, section 2, sub-section *k*, that was repealed. Under this act, except in certain specified cases, a "creditor" is any one to whom the insolvent is indebted. We are not dealing with the estate, in opposing the discharge, but with the person. When we find that the Legislature deliberately departed from the policy of the Act of 1869, the Court must be all the slower to conclude that words which have been omitted from the act ought to be read as if there. Section 51, *Act of 1875*. This clearly refers to parties who have filed claims. Section 52.

The statute abridges the rights of creditors, and there is no reason why it should be so liberally construed as to introduce words which are not there. (RIGBY, J.—Might not the discharge be successfully opposed and yet the estate disposed of as previously decided?) Yes. The word in section 2,—"creditor,"—means every person to whom the insolvent is indebted, and the words must have the same meaning all through the act unless expressly limited in certain cases. *Maxwell on Statutes*, p. 13. (WEATHERBE, J.—The word "creditor" is qualified in different ways through the statute, and only means creditors of a hundred dollars and upwards in certain cases. Whenever it is so limited it is particularly specified.) It would have been absurd for the Legislature to have said that notice should be given only to creditors who have signed the deed already. It is admitted that such are not to get notice. (RIGBY, J.—The element of the creditors being required to be over a hundred dollars does not come into this case. This creditor got notice, and it is to be assumed that it was properly given.) The decision *In Re Creighton*, 1 R. & G., 211, does not go the length of holding that the creditor must not only be over a hundred dollars but must have filed his claim.

W. Ross, contra.—A deed of composition and discharge passes through three stages,—the signing, the approval by the creditors, and the confirmation by the Judge. See sections

49 to 54. By section 66 the deed has no effect until so confirmed. The confirmation of the deed and the discharge of the debt cannot be separated. If the Judge confirms the composition the insolvent gets his discharge. My present purpose is to get at the meaning of the word "execution" in sub-section *h* of section 2. All that I want the Court to agree with me on is that this application is a necessary stage in the proceeding. Cites *Brown's*, *Bouvier's*, and *Abbott's Law Dictionaries* as to the meaning of the word "execution." (WEATHERBE, J.—The word "execute," as applied to a deed, ordinarily means signing, sealing, and delivering. Show us where in the act it means anything different.) This is a deed of composition and discharge. It is a peculiar deed and known only to the statute. Under section 60 it is necessary for the assignee before re-conveying to await the action of the creditors at the meeting. Then for the word "execution" you may substitute the word "completion," which means the same thing. When the deed is signed by the creditors, approved by them at a meeting called for the purpose, and confirmed by the Judge, and not until then, it is completed,—executed. (RIGBY, J.—How do you get over the fact of the notice to all creditors entitled to oppose the discharge under section 53, which included Corastine? That assumes that the insolvent is the only person interested.) The notice was given as a matter of precaution, because Corastine & Co. might have come in that day and proved their claim. As they did not do so, the precaution turns out to have been useless. Cites *In Re Creighton*, 1 R. & G, 211.

MCDONALD, C. J., now, (February 13th, 1882,) delivered the judgment of the Court:—

John Bauer, an insolvent, having obtained from his creditors a deed of composition and discharge, applied by petition to the Judge of the County Court, at Lunenburg, for a confirmation thereof, under the statute. On the day appointed for the consideration of the petition Mr. Wade, an attorney of this Court, and acting for Corastine & Co., of Montreal, creditors of the insolvent, appeared on behalf of his clients to oppose the prayer of the insolvent's petition. Mr. Owen, on behalf of the insolvent, objected that Corastine

& Co. could not be heard in opposition, on the ground that it had not been shown to the Court that Corastine & Co. were creditors of the insolvent within the meaning of the Insolvent Act, or that they had proved a claim, under the act, of one hundred dollars or upwards.

The insolvent, in his petition, states that he had caused notice of the deed being filed, and of his intention to apply for a confirmation of his discharge "to be given to his creditors, by inserting the advertisement, a copy whereof is annexed to the affidavit of Walter S. Doull, (to his petition annexed,) in the official Gazette, and by mailing to each of said petitioner's creditors a card, post paid, on which was printed said notice, at least one month before, etc." Annexed to the petition is an affidavit of Mr. Doull, to which is attached a list of creditors and copy of post card or notice. And Mr. Doull states that the creditors named in the list were served with the notice as required by the act. On this list Corastine & Co. appeared as creditors of the insolvent. There is no other list of creditors among the papers on file, nor other evidence of any kind on the subject.

It is somewhat difficult from the learned Judge's statement or judgment to determine what he really meant to decide,—that is, whether he was of opinion that any creditor who had a claim of any amount could appear to oppose the confirmation of the discharge if he had filed a claim, or that no creditor could so appear who had not filed a claim of one hundred dollars or upwards. I apprehend, however, that the latter was the view of the learned Judge.

It might fairly be contended, I think, that, in the absence of negative proof, the petition of the insolvent and the affidavit of Doull should be held to be an admission by the insolvent that Corastine & Co. were creditors entitled to receive the notice prescribed by the act.

Mr. Owen's contention appears in fact to be that none but creditors who have proved claims of one hundred dollars and upwards are entitled to oppose a confirmation of a discharge under section 54 of the act. To this proposition I cannot assent, and I should entertain no doubt on the subject, had I not before me the judgment of the Court *In Re Creighton*. I need not say that I entertain the highest respect for the

opinion of the two learned and eminent Judges, (not now on this Bench,) who joined in that judgment; but, after the most careful consideration of the several clauses bearing on the point, I cannot reconcile the language used in section 2, sub-section *h*, and section 53, with the conclusions arrived at *In Re Creighton.*

The words "any creditor" in section 53 must mean "any person, co-partnership, or company to whom the insolvent is liable, whether primarily or secondarily, and whether as principal or surety," except where this general meaning is restricted by the exceptions in sub-section *h.*

It cannot be argued that the words "consent to discharge of an insolvent," or "any other consent or *action* with regard to the management and disposal of the estate of an insolvent," include the proceedings for confirmation of discharge by the Judge, because, in section 53, the latter is clearly dealt with as an independent and substantially different proceeding. The words of that section are: "An insolvent who has *procured a consent to his discharge, etc.*, may apply for a confirmation of the discharge effected thereby, etc. And the consent or action with regard to the management and disposal of the estate is clearly not applicable, inasmuch as the confirmation or non-confirmation by the Judge cannot affect the rights of the creditors in the estate, its disposal or management.

In the definition of the word "creditor" in the Act of 1875, the Legislature omitted the very words in the Act of 1869, viz.: "who shall have proved his claim against the estate of the insolvent in the manner provided by this act." We cannot suppose or assume that this was other than an intentional alteration and amendment of this very important clause of the act.

The appeal will be allowed with costs.

JAMES, J.—I concur in this decision, although I was one of the Judges concurring in the former decision. After hearing the question re-argued. I am convinced that the decision *In Re Creighton* was wrong.

WEATHERBE, J.—I need add nothing to what has been said by the other Judges. During the argument the case

In Re Creighton, 1 R. & G., 211, was cited. I have re-examined the question there decided, and am confirmed in the opinion I then delivered, which was then a dissenting opinion, but is now in accordance with the opinion of the Court.

IN RE DAVID BUCKLEY.

(Before McDONALD, C. J. and JAMES, WEATHERBE and RIGBY, JJ.

(Decided February 13th, 1883.)

Appeal under Insolvent Act of 1875 quashed, appellant not having "adopted proceedings on the appeal" within the time limited.

An order was made by the County Court Judge in an insolvent matter under the Act of 1875, for the purpose of appealing from which the insolvent, within eight days from the making of the order, filed a bond approved of by the Judge, and obtained from him an order giving leave to appeal to this Court. No further proceedings were taken in this Court within the eight days.

Held, that the appellant had not "adopted proceedings on the said appeal" within the meaning of section 128 of the Act, and that the alleged appeal must be quashed.

This was an appeal from an order of the Judge of the County Court for District No. 6, making absolute an order *nisi* requiring an insolvent to deliver up to his assignee possession of certain lands. The insolvent filed a bond within eight days from the making of the order, and obtained an order from the Judge below giving him leave to appeal, but no proceedings were taken in this Court within the eight days. A rule to quash the appeal was taken on the ground that no such proceedings had been taken, and upon other grounds appearing in the argument.

Harrington, Q. C., to quash appeal.—The papers were here on the Tuesday preceding the Court, as required, but were sent away under order of the Chief Justice to be certified. No certificate was required, as the Judge below had no power to certify. There must be an application to the Court or a Judge below to allow the appeal. As to what is meant by adopting proceedings on appeal, it is clear that it cannot mean an application to the Judge below for leave to appeal which was already given by the act, but that it means adopting proceedings in the Court above, to which the appellant asserts

his appeal. The papers were not properly here at all and could not be without an order of this Court. *Clarke's Insolvent Law*, 307. There are no grounds of appeal here. The adoption of proceedings is the prime element in the carrying out of the appeal. The Act gives the Judge below no authority to stay proceedings. In the Probate Act and other acts there are special provisions for staying proceedings, but this Judge does it without the shadow of authority.

Weeks, contra.—The Act of 1875 repeals all the proceedings to which Mr. Harrington has called attention as necessary to constitute a valid appeal. The proceedings in insolvency began in February, 1875. The statute of 1875 was to come into operation in September following. The clauses are all eft out of the Act of 1875. Cites *Act of 1869*, clauses 84 and 85. No decision can be pointed to after the Act of 1875 where such proceedings were held necessary. The application to the Supreme Court and notice of such application are abolished, and the appeal is given from the Court below, as in ordinary cases. When everything required is done and the bond is filed, the appeal is perfect. (RIGBY, J.—I think your duty is to show that the papers were properly here on the Tuesday before the term.) The only clause in force in insolvent cases in regard to the return of papers was *Revised Statutes*, 3rd Series, Chap. 138, Sec. 16. If any rules had been prescribed by the Court under the *Insolvent Act of 1869*, they perhaps would have governed, but in the absence of such rules the act cited applies. If no application in appeal and no notice is required, the only proceeding required is the application to the Judge for leave to appeal, the taking of a rule and filing the bond. By virtue of these proceedings the cause is in this Court.

In respect to the rule no grounds are required to be specified, but if grounds are required, the Court has power to amend under Sec. 116, Act of 1875. As to the return of papers, see *Re Parr*, 17 U. C., C. P. The power of amendment extends to procedure as well as to the pleadings.

Harrington, *Q. C.*, in reply.—No Court created by statute has power to do anything the statute does not enable it to do. The stay of proceedings must therefore be set aside. As

regards amendment, the section read, the 116th section, which refers to Judges, Courts and Assignees in insolvency, does not apply to this Court, but to the Insolvent Court, and judges and assignees therein. The power of amendment does not extend to supplying grounds where there are none. The case of *In Re Parr* says that points taken in the Court below, independently of the rule, cannot be taken above. There is no way in which he can be confined to those grounds unless they are in the rule, and the other party has notice. The papers which Mr. Weeks says are here were not here certified or verified in any way when this motion was made. The papers must be certified in some way. The Court cannot look at a mere bundle of papers not verified in any way. If this case is to be governed by the County Court Act, grounds are required.

RIGBY, J., now, (February 13th, 1882,) delivered the judgment of the Court:—

The Judge of the County Court for District No. 6, on the 30th August, 1881, made absolute an order *nisi* in the estate of David Buckley, an insolvent, requiring him to deliver up to his assignee possession of certain lands.

For the purpose of appealing from such order under the provisions of section 128 of the *Insolvent Act of 1875* and amendments, the insolvent, within eight days from the making of such order, filed a bond approved of by the Judge, and obtained from the latter an order giving him leave to appeal to this Court, but no proceedings were had in this Court or before a Judge thereof, within such eight days.

A rule *nisi* to quash the alleged appeal and to have the record returned to the Court below was taken out in this Court on behalf of the respondent, on the 14th of December last, on the ground, among others, that no application for appeal had been made to this Court, or a Judge thereof, nor any notice of appeal or of such application given to the respondents, which rule was subsequently argued before us.

Section 128 of the Act as amended, provides that "no such appeal * * shall be entertained, unless the appellant * * shall have, within eight days from the rendering of such final order * * *adopted proceedings* ON the said

appeal * * *and* shall, within the said delay, have * * given sufficient sureties before a Judge that he will duly prosecute the said appeal * * and pay such damages and costs as may be awarded to the respondent. If the party appellant does not *proceed* with his appeal * * according to the law or the rules of practice, the Court, on application of the respondent, may order the record to be returned to the person entitled to the custody thereof, and condemn the appellant to pay the respondent the costs by him incurred." Something more than the giving of security is therefore required to be done within the eight days, that essential being conjoined to the *adopting of proceedings* ON the appeal. It is difficult to say what further proceedings, other than the giving of security, could be taken in the Court below. The Judge there has no power over the appeal, to grant or disallow it, or to say, as he has done here, that it shall be to this Court, and not to a Judge thereof; but, the security having been given to his approval, the matter passes beyond his control, and there is an appeal, as a matter of course, and within the eight days proceedings on *that* appeal must be adopted,—obviously in the Court to which the appeal has taken the matter, or to one of its Judges,—which would be consistent with the use of the word "*proceed*" in the latter part of the same section, another way of reading, which might be as follows; "If the party appellant does not *proceed*, in the Court, with the appeal, in which he has there *adopted proceedings*, *&c.*, the Court may order the record to be returned, &c."

In the Act of 1869 the procedure on such an appeal was given in section 84, where it is provided that it should not be permitted, unless within five days the party desiring to appeal caused to be served upon the opposite party and upon the assignee, an application in appeal setting forth the proceedings before the Judge, and his decision thereon, and praying for its revision, with a notice of the day on which such application was to be prosecuted, *and* also within the said period caused security to be given before the Judge, &c., and it was held in Ontario that such application was not to the Judge below, but to the Appeal Court, or a Judge thereof. *Hood* v. *Dodd*, 19 Grant, 639; *In Re Sharpe*, 20, U. C.,

C. P., 84. And Mr. Clarke, in his treatise, in the notes to section 128 of the Act of 1875, seems to recognize this as the proper procedure under that section.

I think the appellant was bound, within the eight days, either to give notice of the time and place, when and where, an application to this Court or a Judge, would be presented, or to have obtained a summons or order *nisi* from either; or in some other way adopted proceedings in this Court *on* his appeal, and not having done so the order *nisi* taken out by the respondent must be made absolute with costs.

WEATHERBE, J.—But for the change made in section 128, by substituting "and" for "or," I think our decision would have been the other way. Our attention was not called, at the argument, to the change in the statute, and I had come to an opposite conclusion before seeing it. The statute being altered, I quite agree with the opinion just read.

OUTRAM *v.* TAYLOR.

(Before SMITH, JAMES, and WEATHERBE, JJ.)

(Decided February 17th, 1882.)

Plea of tender.—Statutory plea of payment into Court.—Distinction.

Plaintiff claimed in his writ $160. Defendant pleaded a tender of $58.23 in the usual form, alleging that it was sufficient. Plaintiff replied denying the tender, denying that the amount was sufficient, and denying that plaintiff was always ready, alleging a demand and refusal of the amount. No evidence was given that the money had been paid into Court, though it was so alleged in the plea. The Judge of the County Court found that $58.23 was due, and that the tender was not good, not having been made to a person authorized to receive it. Defendant appealed on the ground that the plaintiff having denied that the amount paid in was sufficient, and the Judge, having found that it was, the judgment should have been for the defendant.

Held, that the plea was properly treated as a plea of tender, and the Judge having found that no valid tender was made, judgment was properly given for the plaintiff, and the appeal must be dismissed with costs.

This was an action brought in the County Court for use and occupation of the plaintiff's house. The defendant, as to $41.71 of the $100 claimed by plaintiff, pleaded never indebted, payment, and a set off for taxes to the amount of $41.71 paid on the property. The fourth plea was as follows:—

And the defendant, for a fourth plea to all the counts of the plaintiff's declaration, first suggesting, as aforesaid, as to the residue of the plaintiff's claim, says, he always was, and

still is, ready and willing to pay to the plaintiff the said $58.23, and before action to wit on the 30th day of September, last past, he tendered and offered to the plaintiff to pay him the same, and the plaintiff refused to accept it, and the defendant now brings the said $58.23 into Court, ready to be paid to the plaintiff.

The plaintiff replied joining issue on all the pleas, and replying, never indebted to the plea of set off. The replication to the fourth plea was as follows:—

And for a replication to the defendant's fourth plea, alleging a tender of payment on the 30th of September, last past, the plaintiff says that the defendant did not tender and offer to pay to the plaintiff the said $58.23, as alleged.

And for a second replication to said fourth plea, the plaintiff says, that at the time of making the said tender in the said fourth plea alleged, there was and still is a larger sum than the said sum of $58.23 due and owing from the defendant, as one entire sum, and in respect of a single entire contract, the same being the money claimed in the particulars of the plaintiff's claim.

And for a third replication to said plea, the plaintiff says, that the defendant was not always ready and willing to pay the said sum of $58.23, parcel of the money claimed to the plaintiff, as in said fourth plea alleged, in this, to wit, that after the making of the said tender, and before the commencement of this suit, the plaintiff demanded of and requested the defendant to pay him, the plaintiff, the said sum of $58.23, parcel of the money claimed, but then the defendant wholly refused to pay the same to the plaintiff.

And for a fourth replication to said fourth plea, and as to the $58.23 paid into Court herein, the plaintiff says, that the same is not sufficient to satisfy the claim sued for herein.

The learned Judge of the County Court, after trial at Halifax, pronounced judgment as follows:—

The rule with regard to taxes between landlord and tenant is, that the tenant is liable, in the first instance, because all the remedies are against him, but that he can charge them to account of rent, *Taylor on Landlord & Tenant*, Sec. 395; *4 Taunt.*, 49; *5 Taun.*, 81, and I can find nothing in

the City Charter that holds the tenant absolutely for it. Mrs. Outram, in her letter of 7th February, stating the terms on which the house would be let, made no mention of taxes, and therefore left them, unexcepted, to the operation of the general rule. On the same date Taylor wrote accepting the proposal, but stipulating that plaintiff was to pay taxes and water rates. On the 8th Mr. Frith wrote defendant that the enclosed memo of agreement, which was lease "B" prepared by him, was satisfactory to her, except in regard to time; this lease made no mention of taxes, and therefore left the rule as to taxes to operate; and, being threatened with an action by Taylor, Mrs. Outram went to Mr. Tupper, and then she appears to have agreed to all the terms of lease "A," excepting out of the furniture the piano. Lease "A" makes no reference to taxes, the contention about which Mrs. Outram appears to have abandoned. However much the deduction may reduce the rent the plaintiff at first expected to receive I see nothing to saddle the defendant with the payment of taxes; nor do I think he was bound to wait until they were distrained for, but could pay them and charge them against the rent. His paying them as he did enured to the benefit of plaintiffs, as he thereby saved for them the 2½ per cent. off. As regards the time, I think the arrangement made in Mr. Tupper's office settles the point that the defendant had the property until the 31st March, allowing a reasonable term for plaintiff to take the furniture away. The defendant says that in a conversation he had with Mrs. Outram on the 18th February, it was agreed between them that 15 days should be allowed for that purpose. The lease "A" has the pencil mark made by Mr. Tupper 1st March; the engrossed lease states the time to be from the 1st day of March, 1879 to 31st day of March, 1881. This would give the defendant a month longer than stated in Mrs. Outram's letter of 7th February, which was two years from the time she left the property, 1st March; but from the evidence I think the defendant is entitled to hold to 31st March, giving the plaintiff fifteen days, if he required it, in which to remove his furniture. I do not think that the tender made to a clerk who disclaimed authority to receive it, *was a good tender.*

I give judgment for plaintiff for $58.23.

The following rule was then granted and argued before the County Court Judge :—

On hearing read the judgment or verdict given herein, the evidence, minutes and exhibits, together with the pleadings in this cause, and the receipt of the Prothonotary on file, and on motion : I do order that the judgment given herein be set aside, and that judgment be entered for defendant, notwithstanding said verdict, or that the judgment given in this cause be changed for defendant, or that said judgment or verdict be set aside and judgment of nonsuit granted against the plaintiff herein ; because the pleadings show that money was paid into Court sufficient to satisfy the claim of the plaintiff herein, and because the learned Judge's decision is such that the judgment or finding should be for defendant, and because money was paid into Court sufficient to satisfy the plaintiff's claim and the plaintiff did not accept the same, but went on to trial at his own risk and the Judge who tried the cause has found said sum to be sufficient to satisfy the plaintiff's claim ;

Unless cause to the contrary be shown before me at Chambers on Thursday next at the new Court House, Halifax.

Halifax, April 1st., 1880.

(Sgd.) J. W. JOHNSTONE.

After argument of this rule, the Judge of the County Court pronounced the following judgment :—

In this action there was a plea of tender pleaded alleging that the amount tendered was brought into Court. To this the plaintiff replied denying the tender and also alleged a demand and refusal after tender and before action brought. On the trial both of these replications were proved, and I gave judgment for the plaintiff for the amount of the sum alleged to have been tendered and brought into Court but as to which no proof was offered nor any receipt of the officer of the Court for the payment shown. On this the defendant applied for and obtained a rule *nisi* to set aside the judgment and to enter it up for defendant, or to change

the judgment into one for the defendant, or that the judgment be set aside and judgment of nonsuit entered up.

The practice that obtains in regard to pleas of tender is thus stated in *1 Tidd.*, 622: "If the defendant bring money into Court on a plea of tender, the plaintiff may take it out, though he reply that the tender was not made before action brought, or he may reply a subsequent demand and refusal. In a case cited in *Tidd's Practice,* Lord MANSFIELD said, "the money having been taken out of Court the plaintiff shall recover only nominal damages, but otherwise judgment would have been for the sum tendered." On the trial there was no proof whether the money had been taken out or not, if indeed it had been paid in, and I, in consequence, gave judgment for the amount mentioned in the plea of tender. Had it been taken out the plaintiff would have been entitled to nominal damages, which would have carried costs. There is a cause in *10 W. R.*, 155; *Philpots* v. *Clifton,* cited in *4 Fisher*, 8302, which is very similar to this one. There there was a tender and payment into Court, and a replication that at the time of tender a larger sum was due as one entire sum on an entire contract. The Judge at the trial ruled that the tender was good, and that if the payment into Court and set-off made up the amount, the verdict should be for defendant, and a verdict was found accordingly, (this is what I am asked to find here,) but the Court granted a rule absolute for a new trial. Mr. Tupper contended that the 3rd and 5th replication that a larger sum was due than the money brought into Court cured or waived the want of a plea of payment of money into Court; but the 3rd replication and perhaps the 5th, is a legitimate replication to a plea of tender, and besides, a replication irrevelant and unnecessary could not have the effect here claimed for it;—a plea of payment cannot be implied and must be pleaded according to the statute, in order that the defendant may have the advantage of it. There being no plea of payment into Court, and no proof that the money was taken out of Court, I am of opinion that my judgment was correct, and the rule *nisi* must be discharged with costs. I have not found it necessary to consider what my power would be to make the order asked for after judgment, the County Court being a statutory Court.

From this judgment the defendant appealed to this Court, and the cause was argued before SMITH, JAMES and WEATHERBE, JJ., February 17th, 1883.

Tupper, in support of appeal.—Plaintiff here waived the difference between our plea of tender and the statutable form of plea of payment into Court, by replying that the amount paid in was not sufficient. *Revised Statutes*, Chap. 94, Sec. 168. (The COURT.—Can the County Court Judge grant a rule like this to set aside his judgment, long after the trial and judgment?) It is in his discretion, and he has exercised it in our favor. The legislature, in giving the Judge power to review his judgments under such a rule as this, has imposed no limit of time. As a matter of fact, this application was made promptly, perhaps not during the term or sittings in which the judgment was given, but soon after its close.

The issue on which we went to trial here under the pleadings, the material issue, was that the money paid into Court was not sufficient, and on that issue we succeeded. *L. R.* 5 C. P. D, 321.

The plea of payment into Court proves itself, through the receipt of the officer indorsed on the plea. *15 M. & W.*, 380; *16 M. & W.*, 752, are authorities shewing that the plea of payment into Court need not be in the exact form set out in the statute, the English statute being like ours. Our plea contains the substance of a plea of payment into Court.

In *Stephen on Pleading*, p. 264, it is expressly laid down that where any one issue going to the whole cause of action is found in favor of defendant, judgment must be for defendant, though half a dozen other issues are found against him. We have pleaded the fact of payment into Court, and plaintiff has raised an issue on it by his replication, going to the whole cause of action. See *5 Dowl.*, P. C., 616; *11 Ea t.* 263. On the point as to bringing money into Court, see *Tidd's Pr.*, 62; *Stephen on Pleading*, pp. 59, 143; Appx. *n.*, 39.

SMITH, J.—We think the appeal must be dismissed.

WEATHERBE, J.—There was a plea of tender and no plea of payment under the statute. There was a replication denying the tender which had to be tried, and the Judge

found that issue against the defendant, treating the plea as a plea of tender. I cannot see that he could have treated the case in any other way whatever. If there had been a plea of payment into Court the argument might have prevailed.

Tupper inquired as to the costs.

WEATHERBE, J.—The costs of the issues below we have nothing to do with. As to the costs of this appeal, I do not see how we can deal with it differently from any other case.

Appeal dismissed with costs.

McLELLAN *v.* INGRAHAM ET AL.

(Before McDONALD, C. J., JAMES, WEATHERBE and RIGBY, JJ.)

(Decided February 13th, 1883.)

Misdirection.—Conflicting Evidence left to Jury as matter of Law.

AN action of trover was brought for three sheep, two of which plaintiff alleged that she had brought with her to the residence of one McKay, with whom she was living when they were taken, and one of which she had purchased when there. The sheep were seized as the property of McKay. McKay and his sister with another witness gave evidence substantially the same as that of the plaintiff as to the property in the sheep and the mode in which it had been acquired. There was evidence that the sheep bore McKay's mark, and a witness for defendants testified that plaintiff had admitted that McKay had appropriated to his own use her sheep, and said he was to have given her others, but had not done so, and that he understood plaintiff's sheep had been killed. The Judge, after referring to the conflicting evidence, told the jury that if the defendants' evidence was true, it was matter of law that the sheep were not the plaintiff's, and he recommended them to bring in a verdict for defendants upon this ground if they took the same view of the evidence, adding that it would be better for the parties that the jury should follow the law, as a departure from the rules of the Court would only tend to prolong litigation.

Held, that the verdict must be set aside on the ground of misdirection.

This was an action of trover for certain cattle and sheep alleged to be the property of the plaintiff, which were taken by the defendants. The cause was tried before JAMES, J., at Baldeck, C. B., in June, 1880. There was conflicting evidence. The jury found for the defendant and a rule was granted to set aside the verdict on the grounds that the verdict was against law and evidence, for the improper rejection of evidence, for the improper reception of evidence, and for misdirection.

The evidence of the plaintiff was that she had been the owner of the sheep, having acquired two of them by bequest

from her uncle and purchased the other after removing to the residence of one McKay, at whose place they were seized under the assumption that they belonged to McKay. The evidence of three members of the McKay family was to the same effect. On the part of the defendants a witness named McGillivray was examined, who swore that in conversation with the plaintiff he had asked her if she had brought the sheep to McKay's, when she replied that McKay had appropriated to his own use her sheep—two or three—and had given her other sheep. He added that he understood they were killed, and further that plaintiff said McKay was to have given her other sheep to replace those he had killed, but had not done so. There was also evidence that the sheep had McKay's mark on them.

The following is the Judge's minute of his charge :—

I charge jury that although the weight of testimony might probably be in favour of plaintiff but for McGillivray's evidence, if his evidence was true the plaintiff acknowledged that her sheep had been killed and that no others had been given her in their place. If McKay promised to give her others that was not sufficient to give her title to them, and they were not hers; that this evidence was corroborated by the evidence given that all the sheep had Neil McKay's mark on them, which would not probably be the case with the sheep she brought with her; and also by her conduct at the time the sheep were removed. If this evidence were true it was matter of law that the sheep were not hers and could not be recovered for in this action, and I recommended them to bring a verdict for defendants upon this ground, if they took the same view of the evidence, adding that it would be better for the parties that they should follow the law, as a departure from the instructions of the Court would only tend to prolong litigation and increase expense to the parties.

At 6.45. Verdict for defendants. I grant a rule *nisi* to set it aside, there being a bond on fyle as security for costs for $200, which I consider sufficient. But for this I would have refused the rule.

Graham, Q. C.—The facts were not left to the jury. The Judge told them it was matter of law. When a Judge tells

the jury that as a matter of law they must find for one of the parties without leaving the evidence to the jury, the verdict will be set aside.

Stopped by the Court.

Ritchie, Q. C., contra.—(RIGBY, J.—If the weight of evidence is with the plaintiff and the Judge recommended a verdict for the defendant, would not that be misdirection?) I think not. (JAMES, J.—I am strongly inclined to think there was misdirection, and that I should have told the jury that the evidence strongly preponderated the other way.) As to objections to Judge's charge cites *2 Chitty.*, 1520; *29 U. C., Q. B.*, 5; *16 U. C., C. P.*, 379. (McDONALD, J.—I think the Judge misdirected the jury in assuming the witness McGillivray, said what he did not say.)

Graham, Q. C.—The plaintiff's evidence is corroborated by four witnesses called by herself and one by the defendant There is no evidence of property in any one else. Even if the plaintiff admitted that her sheep had been killed, and that others had not been substituted, the defendants, as wrong-doers, could not set up a *jus tertii*. (WEATHERBE, J.—My main difficulty is that misdirection alone is not enough to set aside a verdict.) I have cases to show that when there are any facts to be submitted to the jury and the Judge tells them that it is matter of law that they should find for one party, the verdict will be set aside. (WEATHERBE, J.—I admit that there is an exception in that case.) Cites *3 Q B. D.*, 596; *3 Appeal Cases*, 660; *18 C. B.*, 355, 368. Mere silence does not prevent a party from raising the point of misdirection. The verdict must be set aside at all events as against the weight of evidence. (*Ritchie, Q. C.*—We rely upon the case of *Hannan* v. *McLean*, 3 Sup. Court of Canada Reps., 706, in support of the right to set up the *jus tertii*.) If the defendants cannot set up the *jus tertii* they cannot succeed at all. There are no cases to shew that we are bound to take exceptions to the Judge's charge. (*Ritchie, Q. C.*—There is no general ground of misdirection.) Cites *L. R.*, 5 H. L., 591, 600.

McDONALD, C. J., now, (February 13th, 1882,) delivered the following judgment :—

This is an action of trover tried before Mr. Justice JAMES, at Baddeck, at the June Circuit, 1880. The plaintiff sought to recover damages for three sheep, which she alleged the defendants had taken and converted to their own use. The defendants pleaded several pleas, but the only question raised at the trial was as to the property in the goods taken. It appears from the evidence that the plaintiff, an elderly woman, poor and decrepit, lived alone at a place called Little Dove, in Cape Breton, and was the owner of a cow and a few sheep, which had been bequeathed to her by a relative. In the fall of the year 1875 the plaintiff went to live with a man named Neil McKay, who had a farm a short distance from her former residence, and took with her the cow and sheep she then owned. The cow she subsequently sold. The evidence of property in the plaintiff is as follows :—Plaintiff says, "An uncle of mine, Norman McIver, with whom I resided at Buchanan's Mountain, died there previously to my removal to Little Dove. The cow and two of the sheep were bequeathed to me by McIver. The third sheep I purchased after my removal to Little Dove. The sheep were taken away by the defendants. I was residing at the time with Neil McKay, and my sheep were out grazing along with McKay's. This was in the spring of 1876. In April of that year, I think, the defendants came and drove away all the sheep and cattle belonging to McKay, and mine along with them ; they did not tell me why. I told them at the time that three of the sheep belonged to me, but they gave no heed. I never saw my sheep after that."

Neil McKay says :—"The plaintiff came to live with me in the fall of 1875. She owned one cow and three sheep in the spring of 1876. The cow and two of the sheep were given to her by an uncle, McIver, and I sold her another sheep after she came to my place. I afterwards saw the plaintiff's sheep at Baddeck, in McCurdy's barn, and saw Ingraham, one of the defendants, sell them. I told Ingraham three of the sheep belonged to plaintiff, before he sold them."

Mary McKay says :—"The plaintiff got the cow and two sheep from her uncle, Norman McIver. When she came to

my brother Neil's she had one cow and two sheep, and she bought another sheep from my brother Neil in the spring of 1876. The defendants took away the sheep. When the defendants were taking away the sheep the plaintiff warned them not to take away her sheep."

Christie McKay testifies to the same facts, and swears the sheep taken belonged to the plaintiff.

To rebut this case the defendants called several witnesses, none of whom, however, pretended to have any personal knowledge as to the ownership of the sheep. When the sheep were taken away the plaintiff followed her property to Baddeck, and there met one McGillivray, who was in charge for McCurdy, at whose instance the cattle of McKay had been taken. She demanded her property of him, and in reply to a question by him as to where she got these sheep, she gave the same account as is given in her evidence. McGillivray then says, "I asked her if she brought these sheep to Neil McKay's. She said Neil had appropriated to his own use her sheep, two or three, and had given her other sheep. I *understood* they were killed. She said he was to have given her others, but had not done so, *that is to replace those which he had killed.*"

Another witness, Donald Matheson, who had accompanied the plaintiff to Baddeck, and was present at the interview between plaintiff and McCurdy and McGillivray, testifies: "I went and came back with plaintiff. I translated between McCurdy and her. Did not hear her say that McKay had killed her sheep."

On this evidence the learned Judge charged the jury strongly for the defendants, directing a verdict for them, which the jury found. The rule *nisi* to set aside this verdict was granted by the learned Judge on the grounds of misdirection, and because it was against law and evidence. I think this rule should be made absolute on both grounds.

There is not, so far as I can perceive, a particle of evidence to impeach the testimony of the plaintiff and the McKays, but the alleged admission testified to by McGillivray; nor is there any attempt to impeach the character or impugn the veracity of the plaintiff or the McKays, all of whom were personally cognizant of the facts relating to the property and possession of the plaintiff; nor can I discover in the conduct

or conversation of the plaintiff, from first to last, a word or act inconsistent with her claim, as stated in her evidence. The witness, McGillivray, is inconsistent with himself. He first states, "she said Neil had appropriated to his own use her sheep, *two* or *three*, and had given her other sheep." He then says, "I understood they were killed." He does not say plaintiff told him so. He further says, "she said he was to have given her others but had not done so." When are we to assume McGillivray to be correct in his apprehension of what this old woman said to him when claiming her property,—when he says "McKay had given her other sheep," or when he says, "McKay was to have given her other sheep, but had not done so." Surely this testimony so vague, uncertain and contradictory, can have no weight as against that of the plaintiff and her witnesses, the McKays. Yet the learned Judge, in his charge, comments upon it in these terms:—"I charged that although the weight of testimony might probably be in favor of plaintiff but for McGillivray's evidence, if his evidence was true, the plaintiff acknowledged that her sheep had been killed, and that no others had been given her in their place." Now it is clear the learned Judge had read the evidence hastily. The witness, McGillivray, did not say that plaintiff told him McKay had killed the sheep. "His statement is, "I understood they were killed." The Judge also told the jury "that if this evidence," (as so misconstrued by him,) "were true, it was *matter of law* that the sheep were not his and could not be recovered in this action," adding "that it would be better for the parties that they should *follow the law*, as a departure from the instructions of the Court would only tend to prolong litigation, &c." It may probably be that on McGillivray's evidence the Judge was justified in asking the jury's opinion as to the value of such a statement, taking all the circumstances into consideration; but, in my opinion, that evidence taken alone and without contradiction, could not be submitted to the jury as sufficient evidence to find property out of the plaintiff. It was contradicted directly by the evidence of all the plaintiff's witnesses, including herself, who swore that the three sheep belonging to her were taken away by the defendants, and in my opinion the weight of evidence is so overwhelming that the verdict ought to have

been for the plaintiff, and the jury ought at least to have been told to consider the evidence very carefully before finding adversely to plaintiff. It is quite true that a verdict will not be set aside for misdirection on a question of fact, of which the jury are supposed to be competent judges; but I think the learned Judge clearly misdirected the jury in telling them that "if they believed the evidence of McGillivray *it was matter of law that the sheep were not plaintiff's.*" I have already stated my opinion on the question of fact, as strongly at variance with that of the learned Judge, but suppose his construction of McGillivray's evidence to be the sound one how does it become matter of law that the property is not in the plaintiff? The right of property rests on the several facts submitted to the jury, and is determined not by any principle of law to be submitted to them, but on their decision on the evidence before them.

In *Pickup* v. *Thames Ins. Co.*, 3 Q. B. D., 594, the question was as to the seaworthiness of a vessel when she left port, and, the onus of proof of such seaworthiness arising from the presumption of her being compelled to return to port a short time after her departure, the jury asked the Judge "whether he could give them any more precise and positive direction as to which of the parties had the onus of proof cast upon him;" whereupon the Judge "directed the jury as *a matter of law*, that while the presumption of law was *prima facie* in favor of seaworthiness, and the burden of proving unseaworthiness was, in consequence, in the first instance, on the insurers, yet that if the inability of the ship to proceed on her voyage becomes evident in a short time after sailing, *the presumption* of law is that the inability arose from causes existing before the vessel set sail." *Held*, a misdirection. BRETT, C. J., delivering the opinion of the Court, page 606, referring to the case of *Watson* v. *Clarke*, cited on the argument, says: "But I never heard that this case was an authority shewing that a presumption of fact is really a proposition of law. Now if that be so I think it cannot be denied that my brother FIELD so expressed himself that the jury would consider themselves bound to take it as a matter of law, that it was a short time, and a time so short that it shifted the presumption. But my brother, FIELD, who was a party to the judgment of

the Divisional Court, on consideration, admitted that his direction was erroneous." These observations are strictly applicable to the case before the Court; and under the charge of the learned Judge the jury would, of necessity, consider themselves bound to take, as a matter of law, the instruction that, if the evidence of McGillivray was true, the sheep could not be the property of the plaintiff. It is undoubtedly competent to a Judge to indicate to the jury his opinion of the evidence on the trial of a cause, and often desirable in the interests of justice that he should do so; but I think the observations of the learned Judge in this case were, for the reasons given, calculated to withdraw the minds of the jury from the real question at issue.

It was objected on the argument that the attention of the Judge should have been called to this point at the trial. I do not think the objection can prevail. See the English case of *Strickland* v. *Strickland*, 8 C. B., 744, 749, cited in *Chitty's Arch. Practice*, in the notes on p. 1520.

WEATHERBE, J., read an opinion in favor of making absolute the rule, on the ground of misdirection.

RIGBY, J.—I think there was conflicting evidence, and concur in the judgment of the Court on the ground of misdirection.

JAMES, J., read the following dissenting opinion :—

I do not concur with my learned brethren in the opinions which they have delivered that the verdict in this case should be set aside. As respects the question of misdirection, the jury were instructed that, if they believed that the sheep which she had owned were appropriated and killed by Neil McKay, who had promised to give her others in their place, but had not done so, then the plaintiff was not the owner of the sheep for which she sought to recover, and could not maintain the action; and I put this question to them upon the plaintiff's admission, proved by McGillivray, and the evidence that all the sheep taken had McKay's mark upon them, and recommended them, if this was their view of the evidence, to find for the defendants, as a finding against the law would be an injury instead of a benefit to the plaintiff.

In the construction which my brethren have placed on my report of the charge, which is set out in the opinion of the learned Chief Justice, they understand the charge differently, and I cannot help thinking, erroneously.

As far as the opinions delivered turn on the weight of evidence, I am surely right in saying that a unanimous verdict of a jury, approved of by the Judge, ought not, on that ground, to be set aside, except upon strong and clear reasons, in any case; because the parties who hear the *viva voce* examinations of the witnesses are in a better position to decide upon the facts than those who have only a written report of the evidence. More especially is such the case in this instance, because the Gælic language is the common language of the county in which the transaction took place, and in which the case was tried. The plaintiff, whose expressions were given in evidence, spoke in that language, and a material part of the enquiry at the trial was as to the proper translation of words spoken in that language by her. A good deal of evidence of this character was given by persons able to translate that language, to a jury, most or all of whom were more or less acquainted with it.

I think that in such circumstances the jury were peculiarly qualified to decide this case, much better than I could possibly be, because I was not acquainted, as they admitted witnesses were, with the Gælic language; and even if I did not concur in the verdict, I would be very reluctant to disturb it. I think the jury were properly instructed and have given a sound verdict upon the evidence.

TUPPER *v.* MURPHY.

(Before McDONALD, C. J., and JAMES, WEATHERBE and RIGBY, JJ.)

(Decided February 13th, 1882.)

Conviction for sale of Intoxicating Liquors.—Civil or criminal matter.—Certiorari after Judgment.—Bond filed instead of bail.—Sufficiency of grounds in rule nisi.—Notice to Justices before certiorari.—13 Geoorge II., chapter 18.— Crawley *v.* Anderson *over-ruled.*

THE defendant was convicted before F. A. Laurence, Stipendiary Magistrate, presiding in the Town Court of Truro, of selling intoxicating liquors contrary to law. The Stipendiary Magistrate was a rate-payer of the town, and received a fixed salary as Stipendiary, payable out of the funds of the town to which half the penalty imposed became payable.

Held, That the Magistrate was disqualified by interest from acting in the matter.

The ground was taken in the rule to quash the *certiorari* that the bond filed was irregular and bad in substance and form.

Held, that under this ground the objection could not be taken that a bail-piece should have been filed instead of a bond.

The *certiorari* was attacked on the ground that no notice had been given to the Magistrate as required by *Imperial Statute*, 13 Geo. II., cap. 18, but no such ground was taken in the rule.

Held, that this ground could not be taken at the argument. *Quære*, whether the rule requiring notice applied to this case where the Justice acted as a special statutory Court, and not simply as a Justice of the peace.

The ground was also taken that the affidavit required by cap. 12 of the Acts of 1879, (stating that the defendant had not sold intoxicating liquors within six months contrary to law) had not been made.

Held, that the statute did not apply where the proceedings were *coram non judice*.

Held, further, that in cases such as the present *certiorari* would lie after judgment, notwithstanding the general rule that in civil cases *certiorari* will not lie after judgment.

Held, further, over-ruling *Crawley* v. *Anderson*, 1 Gel. & Ox., 335, that it is no objection to the writ of *certiorari* that an appeal also would lie.

Held, per RIGBY, J., and McDONALD, C. J., WEATHERBE, J. *dubitante*, that the Town Court of Truro is a Court of Record.

Per WEATHERBE, J., that the proceeding was a criminal matter.

This was an action brought by the Clerk of License for the Town of Truro against the defendant for breach of the License laws. The defendant was convicted of the offence charged, and the conviction brought up by *certiorari* to the Supreme Court. A rule was taken out on the part of the plaintiff to quash the *certiorari*. It was agreed that the motion to quash the conviction should be argued with the rule to set aside the *certiorari*, and also that the argument in the present case should decide the cases of *Tupper* v. *Schroeder* and *Tupper* v. *McKenzie*, which were, in all essential respects, similar.

The defendant was committed before F. A. Laurence, Esq., Stipendiary Magistrate of the Town of Truro, of selling intoxicating liquors contrary to law, and fined as for a fourth

offence. The constitution of Town Court, in which the proceedings took place, is fully described in the dissenting opinion of WEATHERBE, J., *In Re Simon Fraser*, 1 R. & G., at page 373. The Stipendiary Magistrate was a ratepayer of the Town of Truro, into the funds of which half the amount of the penalty became payable, and his jurisdiction was questioned on that, among other grounds in the rule *nisi* to quash the conviction. The rule *nisi* omitting the grounds abandoned at the argument was as follows:—

On hearing read the affidavit of Silas R. Tupper, sworn to herein on the 27th day of March last past, the affidavit of Samuel D. McLellan, plaintiff's Attorney, sworn to herein the second day of April, instant, and the exhibits thereto annexed, and the original papers on file in this cause, and on motion it is ordered that the writ of *certiorari* herein and the allowance or order therefor be set aside and quashed, and that a writ of *procedendo* be awarded and issued herein with costs, upon the following grounds:—

Because the said affidavit is not made in conformity with Chapter 12, Acts of Nova Scotia, 1879, nor does it contain the allegation by that Act required to be made before a *certiorari* can issue.

Because the bond filed on the issuing of the writ of *certiorari* herein is irregular and bad in substance and in form.

Because the said bond is not conditioned that the defendant herein shall enter and prosecute this *certiorari* or abide by the judgment of the Court on this *certiorari*.

Because the defendant's right of appeal herein not having been lost or defeated, *certiorari* will not lie.

Because the said writ was, without sufficient cause, allowed, and was improvidently issued.

Because the defendant has not shown that he was refused or denied an appeal, and has not accounted for his not appealing.

Unless cause to the contrary be shown to the Court within the first four days of the next ensuing term thereof for arguments in Halfax.

Dated at Halifax the 10th day of April, A. D, 1880.

M. I. WILKINS, *Prothy.*

On motion of *Mr. Henry* for plaintiff.

Henry, Q. C., in support of rule.—The first, second, third and ninth grounds of our rule we abandon for the purpose of this rule. The only objection to be taken under the 6th ground is, that there should have been a bail-piece and not a bond. (WEATHERBE, J.—Can you take that ground? It is not in your rule.) A *certiorari* will only be granted for some substantial reason. *Paley*, 415, says it is refused where there is an appeal. The Town Court is erected under the Acts of 1876, Chapter 49. The fifth section relates to the powers of the Court. The portion we refer to is that which says, "such Court shall have and possess all the powers in civil matters within the Municipality, conferred upon one or more Justices of the Peace," &c. I am familiar with the view expressed by Mr. Justice WEATHERBE, *In Re Simon Fraser*, that the words quoted could not extend the jurisdiction conferred by the preceeding part of the section. *In Re Simon Fraser*, 1 R. & G., 354, it is absolutely decided by this Court that this is a civil matter, and that the Town Court of Truro has jurisdiction. In the Acts of 1876, Chapter 1, Section 9, provision is made in reference to appeal. By the Acts of 1879, Chapter 12, Section 1, the same affidavit is required for a *certiorari* as in cases of appeal.

F. H. Bell, contra.—This action was brought under the License Act, *Revised Statutes*, Chapter 75, Sections 25 and 26. The Act read by *Mr. Henry* was never intended to refer to a case like this, where the Court has no jurisdiction. We have substantially complied with Chapter 12, Acts of 1879, apart from the question of jurisdiction. We have complied with one of two alternative forms, Acts of 1879, Chap. 12, Sec. 1, and Acts of 1876, Chap. 1, Sec. 9. The intention was not to bind us to any particular form. The affidavit is substantially one of merits. Chapter 12, Acts of 1879, taking away the writ of *certiorari*, cannot apply where there is no jurisdiction. *Ex parte Bradlaugh*, 3 Q. B. Div., 509; *King* v. *Cheltenham Commissioners*, 1 Q. B., 467. As to right to *certiorari* being taken away by a statute giving an appeal see *Crawley* v. *Anderson*, 1 Gel. & Ox., 385, and *Eagar* v. *Carey*, 1 R. & G., 49.

The rule as to an appeal taking away the right of *certiorari* seems to rest on a rule of Court, Anne, reported in *1 Salk.*, 146.

Prior to this time, apparently, the fact of there being an appeal was no bar to *certiorari*. The intention of the rule was to prevent the plaintiff taking the case up by *certiorari*, and then keeping the matter hanging until the time for appealing had elapsed, and then abandoning the *certiorari*, depriving the defendant of his appeal. *King* v. *Harman*, Andrew's Reps., 342 ; *Queen* v. *Willats*, 7 Q. B., 516.

According to Chitty, *certiorari* lies in all civil cases before judgment, excepting one or two specified cases, and also in cases after judgment. *Walker* v. *Gaun*, 7 D. & R., 769. In a criminal case it appears that it would be allowed after judgment, for want of jurisdiction.

In Massachusetts, where there is a writ of error, *certiorari* is not allowed, because it is said a writ of error will bring a cause up sooner than *certiorari*. *Tidd's Prac.*, 348, says, "the writ lies generally in all causes before judgment." It lies after judgment where the Magistrate has acted in a summary way, or in a manner different from common law *1 Salk.*, 252; *15 Pick.*, 234.

F. A. Lawrence was personally disqualified to try this cause. *Acts of 1876*, Chap. 49, Sections 2 and 4 ; *3 H. L. C.* 759 ; *8 E. & B.*, 637 ; *1 Q. B.*, 467.

Sedgewick, Q. C., follows as to the point whether the matter is a criminal one or not. The decision *In Re Simon Fraser* is a difficulty in our way, but it is wrong and the Court should expressly overrule it. *Bowyers Civil Law*, 28, citing *Justiman's Code*; *Ron on Judgments*, 215, et seq.; *3 Russell's Ch. Reps.*, 436. Chapter 75, *Revised Statutes*, section 2, prohibits the sale of liquors without license, and sec, 2 prescribes the penalty. I contend that this makes it a criminal matter. Where a statute creates an offence without affixing a penalty, it is a criminal matter and only punishable by indictment. Assuming this principle to be correct, the selling of intoxicating liquors is a misdemeanour, unless the statute makes it something else. The penalty in the present case is fine and imprisonment. This does not take anything away from the act, or make it anything that it would not be if no penalty were provided. The definition in *4 Blackstone's Commentaries*, p. 5, is wrong. Moneys recoverable in *qui tam*

actions are recoverable on an implied contract; *3 Blackstone*, 161. The selling of liquor in England contrary to statute has always been considered a crime; *5 & 6 Edwd.*, 4, cap. 25.

As to what is a criminal matter see *Paley on Convictions*, 112; *1 Bishop's Criminal Law*, p. 84; *41 U. C.*, Q. B., 291. The moment imprisonment under certain circumstances was made part of the punishment, there could be no doubt as to its being a criminal matter. Under Chapter 75, *Revised Statutes*, a man can only be sued for the recovery of money penalties, and no other. Where the offence is punishable by "fine or imprisonment," or "fine and imprisonment," it is necessary to go outside the Act and secure a conviction by indictment. *3 B. & Ald.*, 493. The prisoner has the option and not the Magistrate. A case reported *in re Lucas & McFlashen*, 29 U. C., Q. B., 81, was a prosecution for an offence against the Inland Revenue Act of 1867, in carrying on a distillery without license. The suit was before two Justices of the Peace who, it was held, had no jurisdiction, the offence being a crime.

2 Q. B. Div., 43, was a prosecution for pursuing game by day, contrary to *1 & 2 Wm. IV.*, chap. 32. It was held that the Court of Appeal had no jurisdiction, the matter being a criminal one. In *Blake* v. *Beach*, 2 Exch. Div., 335, keeping a gaming house was held to be a crime, so as to deprive the Court of jurisdiction in a suit for penalties. The whole subject is discussed in *Queen* v. *Hargraves*, 2 Q. B. Div., 37. In Ireland keeping a dog without license is held to be a crime. *L. R.*, 8 Irish Com. Law, 434. Several definitions of crime may be found in *Abbott's Law Dict.*, 322.

In our own Act there is evidence to show that the Legislature intended to treat the offence as a crime, 1st, because it is punishable by imprisonment; 2nd, because provision is made enabling the defendant to give evidence, which would not be necessary if the offence were a civil one; 3rd, because section 32 makes the master of the house responsible for the acts of his wife, child or servant, and throws upon him the burden of showing his innocence. Independently of this, the conviction is bad because the summons is not that prescribed by chapter 75. The use of the form prescribed in the statute is peremptory. The words are "the summons shall

be in the form in Schedule C." *The King* v. *Jeffries*, 4 T. R., 767. The summons was signed by the Town Clerk and had no seal, while the statute requires it to be signed and sealed by two Magistrates. (*Graham, Q. C.*—That was waived by appearing and pleading.) It was not. The point was expressly taken below. The form must be followed. *Queen* v. *Berry*, 28 L. J., 86; *Davison* v. *Gill*, 1 East., 63. There are numerous cases where convictions have been set aside because the summons had no seal. *1 DeGex's Bankruptcy Reps.*, 303.

The conviction itself is bad, because it does not comply with the form of the statute. The manner of the conviction is not stated. There could be no conviction for a fourth offence without the production of the previous conviction. *Hurd on Habeas Corpus*, 401; *Paley on Convictions*, 604. The conviction does not convict in the terms of the statute. *Robertson* v. *Spearman*, 3 B. & Ald., 493. The commitment is bad. It does not set out the offence as set out in the conviction. No Justice of the Peace or Stipendiary Magistrate has power to try this offence. The statute has made no provision for the trial of an offence of this kind, where imprisonment is imposed. There is no procedure provided. Indictment is the only remedy.

Graham, Q. C., in reply.—No reason has been stated for departing from the decision *In Re Simon Fraser*. If there is an appeal, Courts of first instance seldom overrule their own decisions, but await the decision of the Court of Appeal. *9 H. L.*, 338; *L. R.*, 1 E. & I. Apps., 125. The first question is whether this is a civil case or not. It is frequently difficult to determine this question. *10 Exch.*, 1084. A test is given, however, in *Paley on Convictions*, 112. The moral quality of the Act has nothing to do with it; it all depends on the intention of the Legislature. Many of the American cases are cited in *1 Bishop on Criminal Law*, Sec. 43. The test is, whether the remedy is by indictment or action. In the former case it is a criminal, and in the latter, a civil proceeding. See also *12 Mass.*, 271, 272.

The intention of the Legislature is indicated by sec. 23, which provides that the penalties are to be collected as a debt.

In reference to the form of conviction see *Paley on Convictions*, 272. In reference to the disqualification of the Stipendiary Magistrate, see *Acts of 1876*, Chap. 49, Sec. 2. The intention of the Legislature was that the person appointed should be a rate-payer, and the words used take away any possible disqualification. *The King* v. *The Justices of Essex*, 5 M. & S., 513. (RIGBY, J.—The town had the right to appoint a substitute. The cases cited by *Mr. Sedgewick* are very strong.) If this is a civil matter *certiorari* would not lie at all after judgment. The Court is not a Court of Record, because it was not so constituted by statute. If the matter was a crime the *certiorari* cannot be sustained, because notice has to be given to the Magistrate. (*Sedgewick, Q. C.*—That ground is not taken in the rule.) *The County Incorporation Act* gives the County Council power to appoint a Stipendiary Magistrate, by whom the conviction is made. By chap. 9, *Revised Statutes*, Sec. 3, the Stipendiary Magistrate may exercise the powers of two Magistrates. The form of the summons is immaterial; it is drawn up by the Clerk as a ministerial act, and the party having appeared and pleaded it cannot be objected to. *1 Q. B. Div.*, 614; *1 East.*, 649; *1 Str.*, 261.

On the point of notice of application for *certiorari*, cites *25 U. C. Q. B.*, 324; *23 U. C. Q. B.*, 516.

Henry, Q. C., with *Graham, Q. C.*—The law in regard to disqualification is based entirely on the maxim "no party can be judge in his own cause, and any direct interest in the cause disqualifies." All the cases cited are cases where there has been a direct pecuniary interest and prove nothing. What direct interest has Mr. Laurence in the determination of the cause? None. The interest must be in the cause and not in something to be affected by the cause. *L. R., 1 Q. B.*, 230; *L. R., 1 C. P.*, 72.

RIGBY, J., now, (February 13th, 1882,) delivered the judgment of the Court:—

By section 1, Cap. 49, of the Acts of 1876, a Court for the trial of Civil Causes in the Town of Truro is constituted, to be known as the "Town Court," to be presided over by the Recorder or Stipendiary Magistrate. By section 2, it is pro-

vided, that the offices of Recorder and Stipendiary Magistrate may be filled by the same person, appointed by the Mayor and Council, and who is to be a Justice of the Peace; and that in case of his inability, through sickness or otherwise, to perform his duties, the Council are empowered to appoint a suitable person to fill such office during his absence or incapacity. Section 4 provides that all fines, costs and fees are to form a fund out of which the salary of the Recorder and the expenses of the Court are to be defrayed, any deficiency to be paid out of, and any balance remaining after defraying such expenses to be paid into, the general funds of the Town.

On the 11th of November, 1879, a summons was issued against the defendant out of that Court at the suit of the plaintiff, Clerk of License for the Town, in which suit the defendant was, on the 26th of the same month, convicted in such Court, before Frederick A. Laurence, Esquire, Recorder and Stipendiary Magistrate of the Town, of the offence of violating the license laws by selling intoxicating liquors without license, and on the 7th of February following, a writ of certiorari was issued under which the summons, conviction and other proceedings in the suit were returned to this Court.

A rule *nisi*, having been taken out to set aside the certiorari, was argued before us under an agreement between the parties, that in the event of the writ being sustained, this Court, upon such argument, and without further notice, might quash the conviction.

In consequence of the view taken by me of the questions involved in the argument, it will be more convenient to consider, first, the validity of the conviction.

Murphy, in his affidavit, which has not been contradicted, sets forth that Mr. Laurence is paid an annual salary by the town of Truro, that he is a resident of and a ratepayer in that town, and is possessed of real and personal estate therein, and that the proceedings against him, (Murphy,) "were instituted by the authority of a Committee of the Town Council of Truro, known as the License Committee, and Silas R. Tupper. the prosecutor, is Clerk of License in the town and is also Town Clerk, and the penalties, if any are recovered in such proceedings, are all under the by-laws and

regulations of the said town, payable into the town treasury, and form part of the general funds," by virtue, I presume, of the clause in the License Act, which gives one-half the penalties, under that chapter, to the person sueing therefor.

Under this state of facts it was urged at the argument that Mr. Laurence had such an interest in this suit, that he was disqualified from acting as a Judge, and that the conviction should therefore be set aside. Many cases on this point may be found in the books, to some of which I shall refer.

In the case between the *Parishes of Great Charter and Kennington*, 2 Strange, 1173, in which two Justices of the Peace had made an order of removal, which was afterwards quashed at Sessions, because one of the Justices was an inhabitant of the parish from whence the pauper was removed, the matter afterwards having been brought before the Queen's Bench, it was argued that the order of Sessions could not be sustained, as the statute had given jurisdiction to any two Justices in such matters, and so had been the practice. But the Court held that the order for removal was a judicial act, and the party interested was tacitly excepted in the statute, and that the practice could not overturn so fundamental a rule of justice as that a party interested could not be a Judge. And it was said that Lord RAYMOND, who lived in the Parish of Abbott's Langley, went off the Bench when one of their orders came before the Court. The reporter, in a note to this case, alleges that the Act 16 Geo. II., chap. 18, which authorizes Justices to act in matters relating to parishes and places to the rates and taxes of which they are rented or chargeable, was passed to remedy this.

In the case of *The Queen* v. *Cheltenham Commissioners*, 1 Q. B., 467, the order of the Sessions upon an appeal to them from a rate was quashed by the Court, on the ground that the Sessions were improperly constituted, three out of the nineteen Justices present when the order was made, being partners in a Company to which belonged certain premises assessed to the rate in the name of the occupier; and, in a note to this case, at page 479, there is given the case of *Rex* v. *Inhabitants of Rushton*, in which an order of Sessions confirming an order of removal made by two Justices, was quashed by the Queen's Bench, because one of the two

Justices was a rated inhabitant of the removing parish, and that both he and another Justice of those composing the Sessions, were owners of rateable property in the same parish.

The case of *The Queen* v. *The Recorder of Cambridge*, 8 El. & Bl., 637, was an appeal against the valuation of rateable property, under a local act, to the Sessions of the Borough of C———. The Recorder who tried the appeal reduced the rate, and ordered that the costs should be paid by respondents. The amount of costs not being then ascertained, he adjourned the case. At the Sessions at which the matter subsequently came up, a Deputy Recorder, Dr. Leapingwell, presided. The costs were in fact taxed by the Recorder, but the order for costs was drawn up at the Sessions at which the Deputy Recorder presided, and formally entered as of such Sessions, the Deputy not otherwise taking any part in the matter. The respondents were the parish officers of a parish comprised in a Union which comprehended several other parishes, and the Deputy Recorder was a rated inhabitant in one of such other parishes. All the parishes contributed to a common fund for the relief of the poor. Lord CAMPBELL, in giving judgment on a motion for a certiorari, in the Queen's Bench, upon these facts, says: "But it seems to me that Dr. Leapingwell, though in fact he could not in the most remote degree be influenced in making this order, still had an interest which vitiates any award of costs he could make." And WIGHTMAN, J. said "it is clear beyond doubt that this order for costs is the order of Dr. Leapingwell, and his judicial act, and that he has a personal interest in the result, because the costs will be levied out of a common fund, to which the parish where he is an occupier will contribute."

The decree of the Lord Chancellor in *Dunes* v. *The Grand Junction Canal Company*, 3 H. of L. Cases, 759, was held to be voidable, and was set aside on appeal because he was a shareholder in the defendant company, and Lord CAMPBELL, in that case, declares that "it is of the last importance that the maxim, 'no man is to be a judge in his own cause' should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. See also *The Wakefield Local Board of Health* v.

The West Riding and Grimsby Railway Company, L. R. 1 Q. B., 84; *The Queen* v. *Meyer*, 1 Q. B. Div., 173.

The case before us is, in effect, the case of the Town of Truro instituted by their Town Clerk and Clerk of License, by authority of their License Committee, and which, if successful, will supplement their funds to the extent of one-half the penalty recovered; from which funds the plaintiff will, I presume, be recouped any costs which he may have to pay, and into which the act provides that the costs which may be recovered are to be paid.

Mr. Laurence, who was, in fact, the Town Court, was not only an inhabitant of the town, and, as such, a member of the corporation, under section 1, chapter 47 of the Acts of 1875, but was also one of the rate-payers, and his judgment in this suit, as it might be for plaintiff or defendant, would affect the amount of rates which he was liable for. I am of opinion, therefore, upon the authority of the cases to which I have adverted and others upholding the same principle, that Mr. Laurence had such an interest in this suit as to be disqualified from acting, it not being a case in which his jurisdiction should be upheld *ex necessitate rei*, as the suit could have been brought before any of the justices of the county, and that his judgment was voidable and liable to be set aside by this Court if properly brought before it. As against this conclusion two cases were cited by plaintiff's counsel, but neither of these affects the principle of law referred to. In *The Queen* v. *Rand*, L. R. 1 Q. B., 230, the justices whose competency was questioned were trustees only, and had personally no pecuniary interest, and in that case BLACKBURN, J., says that "there is no doubt that any direct pecuniary interest, however small, in the subject of inquiry does disqualify a person from acting as a judge in the matter, and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, *or to other pecuniary loss or gain*, in consequence of their being so, we should think the question different from what it is, for that might be held an interest."

The other case was *Wildes* v. *Russell*, L. R., 1 C. P., 722. The plaintiff having been dismissed from the office of Clerk of the Peace and the defendant appointed, this action was

brought to recover the fees of office received by the latter, it being contended on behalf of plaintiff that his dismissal and defendant's appointment were void, some of the justices who composed the court which dismissed plaintiff having such an interest as disqualified them. The only interest set up in that case which is in point in our present enquiry was the liability of the justices for costs in a matter incidental to the proceedings which resulted in plaintiff's removal, but the court expressly held that the justices were not so liable, and, upon authority of *Dunes* v. *Grand Junction Canal Co.*, decided that the judgment of the justices in sessions which had been attacked would not be *void* by reason of the interest of any of the justices, but *voidable* only by proper proceedings taken to set it aside, and that the court could not question the propriety of their decision in that suit.

It might be argued on behalf of the plaintiff that Mr. Laurence being a justice of the peace, his disqualification was removed by the statute *16 George II.*, chapter 18, already referred to, but the language of Lord CAMPBELL, in *The Queen* v. *Recorder of Cambridge*, is an ample answer to any such contention. He there says: "If, indeed, the case were within the statute *16 George II.*, chapter 18, the objection would be met, but that statute removes the objection only as to justices; the Deputy Recorder was not here acting as a justice of the borough; he was a special functionary."

The writ of *certiorari* by which the proceedings in this suit were brought into this Court has been attacked by the plaintiff on two grounds which, it seems to me, we are not at liberty to consider, as they do not come within any of the grounds specified in the rule *nisi*. One of these grounds is that the defendant, before the issue of the writ, should have filed bail, as provided for in section 57 of chapter 94 of the *Revised Statutes*; and it was contended that that objection could be properly taken under the ground in the rule; "Because the bond filed on the issuing of the writ of *certiorari* herein is irregular, and bad in substance and in form." But I cannot concur in this. That ground could be no notification to the other side that the contention was that a bail piece should have been filed, but would only apprise them that the bond which had been filed was to be attacked, not because

it was an improper mode of security, but because this particular one was defective. The other ground of attack referred to was that no notice had been given to Mr. Laurence of the intention to apply for the *certiorari*, as provided for in the *Imperial Statute*, 13 George II., chapter 18. I question very much if that statute, which provides that before a *certiorari* issues to bring up a conviction, &c., notice to the justice or justices by or before whom it had been made shall be given, applies to the present case, as Mr. Laurence, to repeat again the language of Lord CAMPBELL, "was not here acting as a justice of the county." He was a special functionary. It was not pretended by plaintiff's counsel that this ground was taken in his rule, but he contended that this was not necessary, and cited *Queen* v. *Ellis*, 23 U. C. Q. B., 324, but in that case there *was* a rule *nisi* to set aside the *certiorari*, in which the ground was specifically taken. The only other case cited on the point was *Regina* v. *Peterman*, 25 U. C. Q. B., 516, in which Doyle, for complainant, objected that no notice of the application for the *certiorari* had been given to the convicting justice, and that the rule *nisi* had not been served on him. The Court held, that whatever might be the practice in England, it was proper for them, in such a case, to see that the convicting magistrate was apprised of the proceedings, inasmuch as he was exposed to an action if the conviction should be quashed. The rule *nisi* to quash the *certiorari* was discharged. It would require a precedent somewhat more in point than either of these to convince me that on such an argument as this, where the the *certiorari* is sought to be quashed upon grounds specifically set forth in the rule, it can be attacked on another ground of which the opposing counsel has had no notice whatever. In the case of *Regina* v. *Haggard*, RICHARDS, C. J., says that where the *certiorari* has been issued and there has been some omission, the proper course seems to be to move to quash the writ or the allowance of it, and not to shew the defect as cause against quashing a bad conviction. *30 U. C. Q. B.*, 152. Here we have no evidence that notice was not given, except what may be inferred from the fact that none is to be found on the files of the Court; but it does not follow that defendant could not have shewn that such notice had been

given, if he was aware that the alleged absence of it was to be urged against the writ.

Another ground relied on by plaintiff was that the affidavit upon which the writ was allowed did not follow the form provided for in chapter 12 of the *Provincial Acts of 1879*. The provisions in that statute are restrictive of the general right which suitors have to the writ of *certiorari*, and, in cases instituted for breach of the license laws for the sale of intoxicating liquors, limit the right and prohibit the issue of the writ unless an affidavit containing the allegations set out in section 1 has been made. But there are many English cases to shew, and it has been so decided in this Court, that a statutory clause taking away the writ must be understood to assume that the proceedings to be removed must be before a proper authority; and therefore it did not apply where these were impeached as being invalid for want of competency or jurisdiction in the tribunal before which they were had, because in such a case the proceedings could not be under the Act. It is so said in a note to the *Statute 21 James I.*, chapter 8, which provides for the giving of bail in certain cases before the issue of such a writ, in Vol. 1 of *Chitty's Collection of Statutes*, at page 471, where numerous cases are cited on the point. See also the remarks of DENMAN, J., in *The Queen* v. *Cheltenham Commissioners*, at page 472. If the writ is available upon this ground in cases where the statute expressly prohibits it, a *fortiori* it is available in this case where the proceedings to which the statute had reference when it provided that the special affidavit should be made were not before a competent Court, without the moving party being required to make such an affidavit.

It was further contended that *certiorari* would not lie after judgment, this being a civil matter. It seems to be the law that, as a general rule, this writ will not lie after judgment in civil matters, but cases like the present are exceptions. See the case of *Walker* v. *Gunn*, 7 D. & Ry., 769. The cases of *The Queen* v. *Cheltenham Commissioners*, *The King* v. *Inhabitants of Rushton*, and *The Queen* v. *The Recorder of Cambridge (ante)* were all civil matters removed by *certiorari* after judgment below; and in *Dunes* v. *The Grand Junction Canal Co.*, PARKE, B., at page 757, says: "The

many cases in which the Court of King's Bench has interfered (and may have gone to a great length) where interested parties have acted as magistrates, and quashed the orders made by the Court of which they formed part, afford an analogy. None of these orders are absolutely void; it would create great confusion and inconvenience if it were so. The objection might be one of which the parties acting under these orders might be totally ignorant till the moment of the trial of an action of trespass; but these orders may be quashed after being removed by *certiorari*, and the Court shall do complete justice in that respect."

Another ground relied upon was that the defendant being entitled to an appeal under the statute, the *certiorari* should be quashed. The right to this writ, being a beneficial one for the subject, cannot be taken away without express negative words. See *Chitty's Collection of Statutes*, p. 470, and the cases there cited in the notes. In *The Queen* v. *Willets et al.*, 7 Q. B., 516, it was held that although the time for appealing had not expired, a *certiorari* might be obtained. In *King* v. *Harman et al.*, Andrews, 343, it was decided that where two parties have the right to appeal, and the time for appealing is fixed by the law, it is not reasonable to grant a *certiorari* till the time is elapsed.

The right to this writ where the party had an appeal came before the Supreme Court of New Brunswick in *Ex parte Montgomery*, 3 Allan, 149, and it was held that the right remained notwithstanding the statute gave an appeal, and several English cases were cited in support of this. It is true that in *Crawley* v. *Anderson*, N. S. Decisions, Vol. I., p. 385, in which a *certiorari* was quashed by this Court on the ground that the affidavit on which it was granted was entitled in the cause, which was held to be a fatal defect in point of form, in giving the judgment of the Court the then Chief Justice remarked that the writ *ought not* to issue where the statutable right of appeal has not been lost or defeated. This was clearly an *obiter dictum*, and in *Eagar* v. *Carey*, 1 R. & C., 50, the same learned Judge, during the course of the argument, interpolated the statement that this Court had always held that *certiorari* did not lie where there was an appeal; but the judgment of the Court given at a later day, and after

deliberation, does not repeat the proposition then enunciated. The *certiorari* was set aside without costs because the summary jurisdiction had been taken away from this Court, and it was considered that the cause could not be tried, and nothing could be done with it. I do not think that either of these cases is sufficient to conclude us, in a case like the present, from holding that because the statute gives an appeal from the Town Court, the suitor's common law right to *certiorari* has been thereby taken away.

It was also urged upon us that as the writ in civil matters would only lie to Courts of Record, it was wrongly issued to the Town Court, which was not a Court of Record.

As it was admitted that if this were a criminal matter this objection would not prevail, a sufficient answer to the contention might be found in those provisions of chapter 75 of the *Revised Statutes* and its amendments in which the form of bond and affidavit are given which must be used before a *certiorari* shall issue to bring up proceedings before justices under that statute, the obvious deduction from which is that the legislature either considered prosecutions for penalties under that Act to be criminal matters, or the courts of the Justices in which they were instituted to be Courts of Record.* It has power to impose penalties and imprisonment in default of their payment. Its judgments in cases like the present must be embodied in formal written convictions signed by the presiding official; it is empowered to act judicially in relation to most of the matters over which it has jurisdiction, and it is competent to entertain actions *ex delicto* in the nature of trespasses to land or buildings or other real estate when the title is not involved; and such powers are not consistent with the assumption that it is not a Court of Record.

In *Groenvelt* v. *Burwell*, 1 Salk., 200, it is laid down that wherever a jurisdiction is erected with power to fine and imprison, that is a Court of Record, and for this *8 Coke*,

* *Marginal note by Judge* WEATHERBE: I think it can hardly be said that the justices, under their civil jurisdiction, could form a Court of Record. (If so, what are Courts not of Record?) Therefore all that can be inferred from the Act referred to *is* that the matter is a criminal matter. *See post* p. 189.

60, 38, is cited, and the statute *West. II.*, chapter 11, by which it is enacted that auditors assigned by the lord may commit the party accountant to prison for arrears, under which it has been held that the very lodging of that power in them made them judges of record. In *Hawkins' Pleas of the Crown*, volume 2, chapter 1, section 4, it is said that a court which is not of record cannot impose any fine on an offender, nor award a *capias* against him, nor even hold plea of a common trespass *vi et armis*. In *Chancy* v. *Payne*, 1 Q. B., 724, Lord DENMAN says that convictions have undoubtedly always been treated as records, and in *Paley on Convictions*, page 158, (note,) several cases are given for the proposition that magistrates acting judicially are judges of record. See also the case of *Armstrong* v. *McCaffrey et al.*, vol. 1, Hannay's N. B. Reports, p. 525, where the same principle is recognized.

The only other ground taken by plaintiff was that the *certiorari* in this case was issued improvidently, but as I hold that the affidavit on which it was allowed contains facts sufficient to entitle the defendant to the benefit of the writ, it is unnecessary to say anything further on that point.

Some of the grounds to which I have adverted were not expressly taken in the rule, but as they probably could be raised under the latter ground, they have been fully considered.

The rule *nisi* to set aside the *certiorari* will be discharged with costs and the conviction quashed.

WEATHERBE, J.—It is not necessary in order to agree with my learned brother Judge RIGBY, to hold that this Court was a Court of Record. With the rest of his judgment I entirely agree, and with that I hardly disagree. I cannot come to the conclusion that every Justice trying, not only a criminal but also a civil cause, is a Court of Record, and I hold no opinion on that point. I hold that this is a criminal matter. I held the same view in *1 R. & G.*, 365, and the opinion I then held is confirmed by the argument in this case.

MCDONALD, C. J.—I do not think it is necessary to make any observations, inasmuch as I agree with the able judgment read by my brother RIGBY. I do not think we are driven to the conclusion that every Justice of the Peace trying a civil

cause is a Court of Record. I have no doubt that the Court to which reference is made as the Town Court of Truro is such a Court. It was constituted by the Legislature, having competent jurisdiction, as a Court of Record, and would be so considered under the English decisions and the decisions in New Brunswick and the United States. I concur in the opinion as to the disqualification of Mr. Laurence. As to the matter being of a criminal nature, that question was warmly argued, but I am glad not to have to give any opinion. I have a clear opinion on the subject, but it is not necessary to advance it now.

JAMES, J.—I was not present at the whole of the argument, and pronounce no opinion.

CITY OF HALIFAX *v.* O'CONNOR.

(Before JAMES, WEATHERBE and RIGBY, JJ.)

(Decided February 13th, 1883.)

Conviction for offence different from that charged in Summons.—Prosecution for keeping Junk Store wrongly instituted in Police Court as the suit of the City.

An action was brought against the defendant, in the Police Court, at the suit of the City of Halifax, for an alleged violation of a city ordinance in keeping a *marine and junk store* without license therefor, and, after trial, the defendant was convicted of keeping a *rag and junk shop* without license.

Held, per WEATHERBE and RIGBY, JJ., that the conviction was bad in that the offence for which the defendant was convicted was different from that charged in the summons.

Per RIGBY, J., that the criminal side of the City Court had jurisdiction over the subject matter, and could afford complete redress, and that the prosecution was wrongly instituted in the Police Court at the suit of the City.

Defendant was convicted before the Stipendiary Magistrate for the City of Halifax, for a breach of the city ordinances in keeping a junk shop without license. The proceedings were taken up on certiorari to the County Court for District No. 1, where the conviction was quashed on the grounds of want of jurisdiction on the part of the Magistrate, and insufficiency of evidence. From this decision the present appeal was taken.

The following extract from the minutes of the Police Court was included among the papers returned :—

Present: His Honor, Henry Pryor, Esq., Stipendiary Magistrate.

THE CITY OF HALIFAX,

vs.

JEREMIAH O'CONNOR.

For keeping a rag and junk shop without having a license therefor. The summons was as follows :

POLICE COURT.

CANADA,
PROVINCE OF NOVA SCOTIA,
CITY OF HALIFAX,
SS.

To the City Marshal or his Deputy :

You are hereby commanded to summon Jeremiah O'Connor, of the City of Halifax, Yeoman, to be and appear before the Police Court, at the Police Office, in Halifax aforesaid, on Friday, the 14th day of November, instant, at eleven o'clock in the forenoon, to answer to the suit of the City of Halifax, for violation of Ordinance 29, in keeping a marine and junk store in the City of Halifax, without having a license therefor, to wit on the 30th of October, 1879, and at other times. Hereof fail not and make due return.

Witness my hand and seal at Halifax, this 5th day of November, 1879,

HENRY PRYOR,
Stipendiary Magistrate.

Defendant *appears*, arraigned, Plea, Not Guilty ; Chap. 85, Acts 1867 ; Ordinance No. 29, Chap. 78, Acts 1875.

Thomas Rhind, City Clerk, sworn, states :—I am City Clerk ; the ordinances produced were sent to the Provincial Secretary on June 9th, 1876 ; got them back some days ago ; they were sent to the Governor and Council, and on application I got them back. The ordinance in amendment of an ordinance was brought back 27th of April, 1877.

Cross-examined.—I sent the ordinance with the official letter. I swear that is the paper that was sent to the

Governor and Council. Will not swear that is the paper that was read there. I sent the ordinance up on June 9th, 1876. I transmitted those ordinances by a copy of a letter. I did not carry the ordinances up. Cannot tell who took them up. They were there from 1876 till 1879. I never did see the ordinances in writing. They were taken from slips of ordinances and revised. One ordinance of the City is written and submitted to the Council and approved, and then transmitted to the Governor and Council, then returned to me, and then appears in printed form. Sometimes the Aldermen, the Committee of Laws, and Privileges, and sometimes the Recorder, prepares those ordinances. I do not know who prepared the original ordinances relative to Rag and Junk stores. There may be some of the original ordinances in the City Council papers of the years they were passed. I have not searched for them. The original of the amending ordinance is in my possession I think. I have not searched for it. (Signatures of the Mayor and City Clerk to the confirming ordinance and the ordinance in amendment *in re* Rag and Junk admitted.—Mr. Weeks objects to the papers being received; not original; no proof they are the ordinance, and no proof of the loss of the original.)

William J. Morris, sworn, states:—I am Clerk of License. The accused has no license for a Rag and Junk shop.

Cross-examined.—I have a book that I keep the register in. That book contains a record of all the licenses. I keep that book in my office. I have several books,—one for each class.

Joseph McDonald, sworn, states:—I know O'Connor. I gave him some rags three or four months ago. I received the money from Mr. O'Connor on Watson's wharf. I had one bag. Took it into a store. Mr. O'Connor was not there. Don't know how much I got. I could lift the bag.

Cross-examined.—I did not see O'Connor there when I delivered the stuff. Could not tell the month. It was three or four months ago.

Henry Inglis, sworn, states:—I know O'Connor. He has a place of business on Watson's wharf. Have seen him there three or four times. There is old iron, rope, canvas, etc., in

the store. I know McDonald. Saw him there on the 30th October. He had a lot of cuttings. He put it on the scales. O'Connor helped him. It weighed 22 lbs. Saw no money pass. There was a dispute about the weight. They said it was two cents a pound. McDonald said whenever he sold to O'Connor it ran short. I saw O'Connor in the act of paying him, and he said he had no change. I then came away.

Cross-examined. (Objected to).—Had not been in the store once. Never was in the store. There is no sign on the store. Could not say who owns the store. Know McKean. Cannot tell if he occupies the store.

Sergt. Nickerson, sworn. states:—I know O'Connor. Don't know anything about him in regard to his keeping a rag and junk store.

On this evidence the defendant was convicted of keeping a junk store without license.

The following is the judgment of the learned Judge of the County Court:—

A *certiorari* was granted removing the proceedings in this cause from the City Police Court to this Court, and a rule *nisi* was granted to quash the conviction below, and that the judgment below be reversed, or a new trial had on the ground of irregularity, and on other grounds which are explained in the rule.

I may say, in commencing, that the only by-law of the city that was properly before the Court below, and the only one which I have considered, is the original by-law No. 29, respecting Rag and Junk stores.

The complaint that the defendant was summoned to answer was for violation of Ordinance 29, in keeping a marine and junk store in the City of Halifax without having a license therefor. The amended ordinance requires all those who deal in rags, junk or marine stores, either in shops, etc., to obtain a license, and, as a *quasi* criminal proceeding, inflicting imprisonment in default of a fine. I think that the charge against him that he was called on to answer, ought to have been specifically and with certainty alleged in the summons, and that if the defendant was intended to be

charged with the violation of the amended ordinance he should have been apprised of that fact.

I have next to consider whether evidence of the by-law was properly received in the Court below; whether it was only secondary, as alleged, received without properly accounting for the loss of the original, and whether the by-law itself was beyond the power of the Council to pass, and therefore *ultra vires*.

I am of opinion that the learned Stipendiary was right in receiving the evidence he did. Section 110 provides that no by-law shall take effect until approved and confirmed by the Governor-in-Council. Section 111 provides in what way this should be done. A copy is to be submitted to the Governor, and if, after thirty days, it is not disapproved of, it shall be considered as approved and confirmed. Now I think that the by-law sent to the Governor-in-Council and so returned must be considered as the original by-law, and that it would be against both the spirit and the intention of the Act to compel the City Council to keep all the slips of paper on which the drafted by-laws were originally written and produce them on the occasion of every trial, where they would be of no value until it was proved that they had been confirmed. I do not go the length of determining that the defendant is absolutely precluded from shewing that, through fraud or mistake, etc., bogus or altered by-laws have been substituted for those passed by the City Council and sent up for approval, but until he shows that I hold that the by-law so approved should be accepted to all intents and purposes as the original. Sec. 1, cap. 38, 1875, authorizes the City Council to demand a sum to be fixed by resolution for the granting of a license for opening a rag or junk store. The City Council, by their by-law 29, fix the sum to be paid for a license at fifty dollars, and, considering the by-law a resolution fixing the license fee, I do not consider that the City Council exceeded their powers, and that, therefore, by-law 29, which was sent for approval June, 1876, after the passage of the Act, is not *ultra vires*. Whether the authority vested in the City Council to alter or amend any by-law or ordinance for the good rule, peace, government and welfare of the city would authorize them to

pass the amended by-law referred to, it is not within my province now to decide.

The next point is, whether the action was rightfully instituted in the Police Court, and it is one of a good deal of importance, inasmuch as in the provisions relating to the Police Court, *no* appeal from the sentence of the Stipendiary Magistrate is allowed, except by Writ of *Certiorari* or *Habeas Corpus cum causa*.

The City Court is divided into two branches—the City Civil Court and City Criminal Court. The City Criminal Court has power and jurisdiction to try and determine all complaints of any breach of any by-law or ordinance of the city. Sec. 543 provides that all fines and penalties imposed by any by-law or ordinance of the city for the recovery whereof no provision is otherwise made, shall be sued for and recovered before the City Court. By-law 29 provides that the trial of any offender against the by-law shall take place at the Police Office—thus designating the place but not the Court.

It appears to me clear, beyond all question, that the City Criminal Court branch of the City Court was the proper tribunal before which this matter ought to have been adjudicated, and from the decision of which there is, by statute, an appeal, for section 13 expressly provides that an appeal shall be allowed from the decision of such City Court in all cases. Nor does it militate against this view that by-law 29 inflicts imprisonment, as an alternative, on non-payment of the fine imposed on conviction; for section 544 provides, that while in every such suit in the City Court, the defendant shall be entitled to the benefit of the Act for the relief of insolvent debtors, yet the defendant shall not be entitled to his discharge from imprisonment until the period of imprisonment prescribed on non-payment of the penalty shall have elapsed. Ordinance 4 provides that all fines and penalties incurred under any by-law or ordinance may be enforced in the City Court at the suit of the city, or in the Police Court, at the prosecution of *any person whomsoever*. The words *any person whomsoever* could hardly be construed to extend to the city, so as to give the city a choice of tribunals, and if it could, a Judge would hesitate a long time before he allowed an ordinance to override the statute, or permit the citizens'

right of appeal to be taken away by any such side-wind. But, even had the Police Court been the proper tribunal, I am of opinion that the learned Stipendiary Magistrate should have allowed an appeal from his judgment, for the substituted Sec. 65, cap. 27, Dominion Act, 1877, gives an appeal to the County Court from all convictions or orders where no appeal to another jurisdiction is provided. Another objection urged is that the conviction is against law and evidence. The learned Stipendiary Magistrate thought that there was sufficient proof, though of a slight nature, to justify him in pronouncing the defendant guilty, and this when he had the amended as well as the original by-law before him. Applying the evidence to the original by-law 29, the only one I have considered, I am unable to find any evidence that would warrant the conviction of the defendant.

For these reasons, I feel bound to quash the conviction and set aside the judgment below; and, inasmuch as I think that the summons was irregular, and that the Police Court was not the proper tribunal before which the cause should have been tried, it would avail nothing to order a new trial.

Ritchie, Q. C., in support of appeal.—The City Police Court is the proper court to try this cause. The City Charter is Chapter 81, Acts of 1864. Cites section 114. When this Act was passed the City Court was distinct from the Police Court and was presided over by the Mayor, Aldermen and Recorder. Section 130 gives the jurisdiction of the Criminal Court, no part of which relates to proceedings for violation of by-laws. Section 147 shows where the Court was to sit. Sections 542 and 543 provide for the recovery of certain fines and penalties. The words above indicate that the sections refer to suits for penalties, that is, suits in the ordinary way in the Civil Court. Section 594 refers to "prosecutions" for penalties, for the recovery of which no mode of recovery is prescribed, which may be recovered in the Police Office. There are apparently two ways, by suit or by prosecution. Section 549 makes the by-laws law. Sections 107 and 108 are the sections under which the making of by-laws is authorized. Ordinance 29, section 3, provides for the penalty sued for. Chapter 22, Acts of 1880, Section 2, confirms the by-laws and ordinances.

The Act of 1864 was amended by the Act of 1865, Chap. 87. This Act shows where the Police Court sits, and that the words Police Office and Police Court are interchangeable terms. Up to the passage of Chapter 87, Acts of 1865, suits for penalties were to be brought in the City Civil Court, and prosecutions were in the Police Court, but the City Criminal Court had no jurisdiction. By this Act jurisdiction was given to the City Criminal Court. The jurisdiction of the other Courts was not taken away. Section 82 of the Acts of 1867 defines the jurisdiction of the Stipendiary Magistrate and gives him jurisdiction in these very cases. Chapter 37 of the Acts of 1870, section 2, also relates to jurisdiction, giving the Stipendiary Magistrate, as such, power to enforce the by-laws. The Judge below held that "any person" in the Act did not include the City. On this point see *Revised Statutes*, chap. 1, section 7. The word person includes corporations. The conviction is good and fully sustained by the evidence. The discretion of the Stipendiary Magistrate on a question of evidence cannot be interfered with by certiorari. *Queen v. Levy*, 3 R. & C., 51.

The offence was subsequently set out in the summons, but, if not, the point was not taken in the Court below. No conviction can be quashed merely for want of form. Acts of 1864, chap. 81, sec. 137. If there was no jurisdiction below the certiorari would not lie. (RIGBY, J.—I don't know that you can take advantage of that on this motion.) If the Court below had jurisdiction the writ of *certiorari* would not lie. *28 U. C., Q. B.*, 394; *O'Connor* v. *Condon*, reported in note in 1 R. & G.

Weeks, contra.—On the last point, as to jurisdiction, there is no doubt certiorari will lie. *11 A. & E.*, 194, cited in Chipman's Notes, 111; *O'Brien* v. *Walsh*, 28 U. C., Q. B., 394. It will lie even where the remedy is expressly taken away, where excessive jurisdiction is exercised. *3 Q. B.*, Div. 109; *3 El. & El.*; *Queen* v. *Fordham*, 11 A. & E., 80. The city having designated the tribunal, is bound by it. The City Council has no power to confer jurisdiction upon a Court. To erect a tribunal having the power to try a criminal case is *ultra vires* the City Council. (WEATHERBE, J.—That is not contended. *Mr. Ritchie* says the Act gives the power. That is

all you have to meet.) The summons calls upon the defendant to appear in the Police Court for a violation of Ordinance 29, in keeping a marine and junk shop. (RIGBY, J.—Where does it appear that the defendant objected to proceeding in consequence of the writ not containing the offence.) In O'Connor's affidavit. It was before the Court. (WEATHERBE, J.—I don't think it was specifically stated.) (RIGBY, J.—I don't think there was a sufficient allegation of the offence, but the objection was not taken.) The Court cannot take judicial notice of by-laws of any corporation, and there is no presumption in favor of inferior local jurisdictions. *4 Allen*, 73. Ordinance 29 imposes no penalty for keeping a marine and junk store. (WEATHERBE, J.—Well, we said that long ago.) They cannot go outside of that ordinance. There was no evidence of the offence of which the defendant was convicted. (WEATHERBE, J.—I don't understand that there was any conviction at all.) Cites *Acts of 1865*, chap. 7, sec. 128, sub-sec. 6.

Ritchie, Q. C., in reply.—The conviction is not here at all. In this case it has never been signed. The form of conviction is that of summary conviction in the Justices of the Peace Act. Where the conviction is not void for want of form, the summons cannot be held to be so. By the 144th section the process is to be prepared and issued by the City Clerk. Chapter 31, Acts of 1869, section 5, shows that if there was any variance, and the objection was taken, the case could be adjourned to another day. The variance would not affect the summons, as it might be amended. The appeal is not to the County Court under the Acts of 1860, chap. 27, sec. 65, but to the Supreme Court. (*Fielding.*—That is not in the rule.) Then I ask leave to amend, which is done time and again. (WEATHERBE, J.—It is too late, we would have to rehear the argument.) The Local Legislature has no power to give jurisdiction by certiorari in a criminal matter to the County Court. (*Fielding.*—That is not in the rule either.)

RIGBY, J., now, (February 13th, 1882,) delivered the judgment of the Court:

An action having been brought at the suit of the City of Halifax in the Police Court, against Jeremiah O'Connor, for

an alleged violation of Ordnance 29, in keeping a *marine and junk store* without a license therefor, he was, after trial, convicted of keeping a *rag and junk shop*, without license, and fined four dollars or four days in the City Prison. An appeal having been refused, the proceedings were taken into the County Court by writ of *Certiorari*, at the instance of the defendant, where the conviction was quashed, and the matter then came before us on appeal.

One of the grounds taken in the rule for quashing the conviction was that "the proceedings were instituted in the Police Court at the suit of the city, and the proceedings taken were irregular and void."

Sections 130 to 140 of Chapter 81 of the Acts of 1864, "An Act concerning the City of Halifax," refer to "Criminal and Penal Prosecutions," and by section 133 it is provided, "that the Mayor, or one of the Aldermen, in rotation, shall daily attend at the public office for that purpose appointed, and constantly, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon, shall perform every act appertaining to the office of Justice of the Peace, necessary for the apprehension, committal, conviction, and punishment of criminal offenders, and for carrying into effect the laws in force and the ordinances and by-laws of the city, *as set forth in the foregoing section.*" The latter words, "as set forth in the foregoing section," are meaningless, as the section referred to only provides a limitation within which prosecutions in the City Court, at its criminal sittings, shall be cognizable. This court of the Mayor or Aldermen, is afterwards referred to as the "Police Court" in sections 139, 143, 150, and others, and also in section 5 of chapter 87 of the Acts of 1865, where its jurisdiction is further defined. By chapter 82 of the Acts of 1867, as amended by chapter 37 of the Acts of 1870, the appointment of a Stipendiary Magistrate is provided for, who, besides having to conduct the business of the City Court, has to perform all the duties and functions which before had been performed by the Mayor and Aldermen in the administration of the Police Court. While the Act of 1864 empowers the City Court to make orders and regulations respecting the practice therein, and to prescribe and adopt forms of writs and proceedings for conducting the civil and criminal business

of that Court, (sec. 131,) and fixes the fees payable in criminal cases in that Court, (sec. 141,) no provision whatever is made in relation to the procedure and forms to be followed in the Police Court, in any section of the Act or its amendments, except in the case of prosecutions for penalties for violating the license law, (secs. 218 and 219,) to which I shall hereafter refer; and a clause requiring that a book shall be kept in which criminal charges made at the office are to be entered, and certain general enactments in reference to the issue of warrants and process of summons or arrest, and providing before whom affidavits are to be sworn, (secs. 143 and 144.)

Is it not evident, therefore, that the proceedings in that Court can only be conducted by the Stipendiary Magistrate in the same way and according to the same procedure as similar matters, under the general law, should be carried on by any other Justice of the Peace, in the exercise of his criminal jurisdiction? Must not prosecutions be conducted either under the provisions of chapter 30 of the Dominion Acts of 1869, respecting the duties of Justices of the Peace out of session, in relation to persons charged with indictable offences, or chapter 31, in relation to summary convictions and orders, except in those cases referred to in the Acts relating to the City which provide for the summary trial of persons arrested on view and brought before the Stipendiary Magistrate, charged with the commission of some petty offence against the police regulations, or otherwise; and must not all prosecutions necessarily be in the name of Her Majesty, unless in those exceptional cases, if any, in which the legislature has otherwise provided? I can find no precedent for the form of summons used in the present case, unless it is adopted from the one given in section 219 of the Acts of 1864, already referred to as the form of summons to be issued in cases under section 218. The latter section is, however, repealed by section 17 of chapter 87 of the Acts of 1875, and with it, it seems to me, must go the form in question.

It was contended, on behalf of the plaintiff, that section 543 of the Act of 1864 justified the bringing of this suit in the name of the city; but that section cannot be intended to [illegible] to actions in the Police Court. It provides that suits [illegible] and penalties, for the recovery whereof no provision

is otherwise made, should be brought in the name of the city before the "*Mayor's Court*," in the same manner as any debts could be recovered in that Court. But there was then no such court as the Mayor's Court, which was a court that, before the Act of 1864, had jurisdiction for the trial of civil causes within the city, by virtue of the provisions of section 80 of chapter 14 of the Acts of 1849, and for which the civil jurisdiction of the City Court was substituted in the Act of 1864. But section 594 of the latter Act provides that penalties or forfeitures imposed by the Act where no particular mode is prescribed for the recovery thereof, may be recovered in the name of the City of Halifax, before the Mayor or presiding Alderman at the Police office. The language of this section is distinguishable from section 543, in that it refers only to penalties imposed by the Act, while the latter refers as well to penalties imposed by any *by-law or ordinance of the City Council made under the authority of the Act*, which would cover the present cause, and which, it may reasonably be inferred, was intended to be excluded from the operation of section 594; and the words "Mayor or presiding Alderman at the Police Office," might be intended to refer to the civil jurisdiction of the Justices, or to the City Court, over which the "Mayor, one Alderman and the Recorder," by section 114, were to preside, and the process from which Court, according to section 147, was to be issued from the "Police Office," especially as the act provides no other place for the sitting of that Court; and while section 188 enacts that penalties for breach of the license laws or of the city laws, or ordinances of the city, shall be adjudged by the City Court, section 218 provides that the suit for recovering the very same penalties shall be brought in the name of the City in the Police Office In a penal matter, such as the one before us, I do not think we are at liberty to conclude that the words "Mayor or presiding Alderman" in this section, 594, is intended to refer to the Police Court. For the same reasons section 15 of chapter 87 of the Acts of 1875, which provides for the bringing of suits in the name of the City, at the Police Office, must be taken to refer to suits before the City Court.

Our attention was also drawn to the fact that Ordinance 4 provides that fines or penalties may be enforced in the Police

Court at the prosecution of any person whomsoever. This does not authorize the prosecutor to bring a suit in his own name, as plaintiff, as the former part of the ordnance does, where it provides for action in the City Court for the same subject, to be at the suit of the City. Ordnance 29 directs that prosecutions for the penalties thereunder shall be in the name of the City, at the Police Court, before the Stipendiary Magistrate. This might mean either the Police Court or the City Court.

I cannot, however, find that any authority was conferred on the City Council to make any by-law or ordinance declaring in whose name, or before what Court, such prosecutions should be instituted. Section 108 of the Act of 1864 certainly does not, and the Statute of 1880, chapter 22, which confirms the by-laws and ordinances of the city, and which was passed subsequently to the bringing of this suit, cannot be held to have a retroactive effect, so as to confer jurisdiction upon the Police Court to entertain a suit over which it previously had no jurisdiction.

I am therefore of opinion that this prosecution was wrongly instituted in the Police Court, at the suit of the City, and that the proceedings were irregular and void; and I am strengthened in this conclusion by the fact that the *criminal side* of the City Court, under the provisions of section 130 of the Act of 1864, as amended by section 6 of chapter 87 of the Acts of 1875, has undoubted jurisdiction over the subject matter, and can afford complete redress. And it would seem to be a very anomalous state of things to have two Courts within the city, presided over by the same individual, with power to entertain such prosecutions.

There is another objection upon which, I think, this appeal must fail, and which is covered by the 14th ground in defendant's rule, and that is because the appellee has been convicted of a different offence from that charged in the summons. This is matter of substance and not one of form falling within the language of section 137 of the Act of 1864, nor is it cured by the provisions of sections 21 and 22 of chapter 31 of the Dominion Act of 1869. to which we were referred by *Mr. Ritchie.* These sections refer to variances between the information and evidence adduced in support

thereof. In the case of *Martin* v. *Pidgeon*, El. & El., 778, the appellant, having been summoned before Justices, under Statute 10 and 11 Vic., chapter 89, section 29, on a charge of drunkenness and riotous behaviour, the Justices held the riotous behaviour not proved, but convicted him of drunkenness and fined him under Statute 21, Jac. 1, chap. 7, sec. 3. It was held by the Queen's Bench that the conviction was bad, and that the defect was not a variance that could be cured under section 1 of 11 and 12 Vic., chap 43, the language of which is almost identical with sections 21 and 22 of the Dominion Act.

The appeal will be dismissed with costs.

WEATHERBE, J.—I think we are not necessarily called on to decide any question except that last referred to. It must be apparent to every one, from what has just been said, that the statutes under which the tribunal appealed from claimed jurisdiction are in a most extraordinary state of confusion, and require the most careful attention of the city authorities, and perhaps the Legislature.

I think the appeal must be sustained, on the ground that the offence for which the defendant has been convicted is different from that charged in the summons.

CHRISTIE *v.* THOMAS.

(Before SMITH, JAMES and WEATHERBE, JJ.)

(Decided February 15th, 1882.)

Equitable Replication without leave.—Departure.

In an action of trover for logs, defendant pleaded denying plaintiff's property and possession, and plaintiff replied setting up an equitable right to the logs. The Judge at *nisi prius* ruled that there was a departure in the pleading on the part of the plaintiff, who had, in his replication, set up an equitable interest in the property, instead of the legal right asserted in his declaration; and he directed the jury to find a verdict for defendant, which they did. The COURT refused to set aside the verdict, SMITH, J., holding that there was no evidence of property in the plaintiff; WEATHERBE, J., that the replication was only a reply to a bad plea as shown by the pleadings, q. v.

This was an action of trover for logs, to which the defendant pleaded, denying the conversion, denying the plaintiff's property and possession, and claiming property and

possession in himself. The following were the fourth, fifth, sixth and seventh pleas :—

4. And the defendant further says that the several counts in the plaintiff's writ are for one and the same cause of action, and for a plea thereto the defendant says that the said nine hundred and thirty logs or trees, lumber or goods set out in said counts of the plaintiff's writ and declaration, were not nor were any or either of them the plaintiff's, as alleged.

5. And for a further plea to said counts of the plaintiff's writ, the defendant says that the plaintiff was never lawfully in possession of the said logs or trees, lumber or goods set out in said counts and writ.

6. And for a further plea to said counts of the plaintiff's writ, the defendant denies that the said logs or trees, lumber or goods mentioned in the plaintiff's writ, were the property of the plaintiff, and also denies that he converted the same to his own use or wrongfully deprived the plaintiff of the use or possession thereof; or seized or took the same and disposed thereof to his own use, as alleged in said writ.

7. And for a further plea to said counts of the plaintiff's writ, the defendant says that the said trees and logs grew on a certain lot of land of which the defendant was and still is seized in fee, and that the said trees and logs were found by the defendant cut upon his land without his knowledge or consent, wherefore he took possession of the same and sold and disposed of the same to one Campbell W. Johnston, as he had a right to do, and that the plaintiff has no cause of action against the defendant for the same.

Plaintiff, after joining issue, replied without leave as follows :—

2. And for a replication on equitable grounds to the fourth, fifth, sixth and seventh pleas of the defendant, the plaintiff says that on or about the month of January, 1878, one John D. Christie, by an oral agreement with the said defendant, agreed to purchase, and the said defendant agreed to bargain and sell the said land, and purported to bargain and sell, and did bargain and sell the same, to the said John D. Christie, for the sum of two hundred dollars, to be paid as follows, one hundred dollars in a short time thereafter, and

the remaining one hundred dollars within one year from the date of said agreement, and thereupon the said John D. Christie was put into possession of the said land by the said defendant, and proceeded to erect buildings thereon, cut roads, and improve the said land and cut logs thereon, and expended large sums of money thereat in wages and supplies at the said work, and while engaged at the said work, to wit, on or about the twenty-second day of February, 1878, paid to the said defendant the sum of one hundred dollars, part of the consideration of the said sale, which was accepted as such by the said defendant, and the said John D. Christie continued throughout the winter of 1878 to carry on lumbering operations on said land, and to expend money in connection with the same, of all of which matters the said defendant was fully aware, and the said plaintiff, relying upon the possession of the said land and logs, enjoyed as aforesaid by the said John D. Christie, and also upon the fact that the said defendant was aware as aforesaid of the operations that were being carried on as aforesaid on said lands, advanced large sums of money on account of the said John D. Christie to the defendant and others, and a large part of the said money was expended on account of the operations carried on as aforesaid on said land; and afterwards the said plaintiff, relying upon the said possession and the matters hereinbefore set out, and at the request of the said John D. Christie, advanced further sums and became responsible for further sums of money on his account, and in consideration of said advances and responsibilities, took from the said John D. Christie a conveyance by deed, among other things, of the said logs mentioned in the declaration herein and afterwards, to wit, on or about the third day of February, 1879, the said John D. Christie tendered to the said defendant the sum of one hundred dollars, being the balance of the purchase money of the said land, and demanded a deed of the same, but the said defendant refused to accept the said money or to give a deed of the said land as requested, and the plaintiff says that it is by virtue of the facts set out in this replication that the plaintiff claims that he is entitled to recover in this action.

3. And for a third replication on equitable grounds to the said fourth, fifth, sixth and seventh pleas, the said

plaintiff says that one John D. Christie cut the said logs on the said land with the leave and license of the said defendant, and in and about the cutting of logs expended large sums of money, and afterwards and before the beginning of this action, with the knowledge and consent of the said defendant, sold and transferred the said logs to the plaintiff for a valuable consideration, wherefore the said plaintiff says that the defendant should be stopped from asserting any claim to the said logs.

The following rejoinder was pleaded :—

1. The defendant, by Norman J. Layton, his attorney, joins issue upon the second and third replications pleaded by the plaintiff herein.

2. And for a rejoinder upon equitable grounds to said second and third replications, defendant says that he agreed to sell to said John D. Christie the lot of land referred to in said replication for the consideration therein mentioned, and the said John D. Christie thereupon entered upon said land and cut down thereon the logs in the declaration mentioned, but the said John D. Christie never paid, or tendered, or offered to pay to the defendant the said consideration money or any part thereof, nor did he carry out his part of the agreement for the purchase of said land, as plaintiff well knew, and the defendant says that having an equitable lien upon the said land and the logs which had been cut thereupon, and which were still lying and being in and upon said land, for the said unpaid purchase money, and the legal estate in said land and logs being still in him, the defendant, and the plaintiff being about to remove said logs, he, the defendant, entered upon said land and took and carried away said logs, in pursuance and by virtue of said lien, and for the protection and enforcement thereof, which is the alleged conversion.

The cause was tried before McDONALD, J., at Truro, who reported his charge to the jury as follows :—

I told the jury that, assuming all the evidence given on the part of the plaintiff to be true, a verdict in his favor could not be upheld, and I explained to them that the action was commenced at common law for trespass and conversion of

logs alleged in the declaration to be the property of the plaintiff, to which declaration the defendant pleaded, among other things, property and possession out of the plaintiff, and which, if true, would show some interest of an equitable kind in him, fit to be made the subject of investigation in another way. But I said that these replications were objectionable in this Court on various grounds. They were pleaded without leave of the Court or a Judge, as the statute required. They were a departure in pleading, and they attempted to set up an equitable interest in the property instead of the legal right alleged in the declaration as the foundation of a claim at common law to recover damages against the legal owner in possession for injuries to the property in question. I said, if the case had been reversed and if the plaintiff in this cause had been sued by the now defendant for trespass and conversion, the law would clearly allow an equitable defence, if there were any, to be pleaded without any leave of the Court or a Judge, but I thought that neither the Court nor a Judge would ever have given leave to plead the replication filed in this cause. To hold the contrary, I said, would be in effect to hold that this Court could assume original jurisdiction by virtue of a false system of pleading in a case in which, if the plaintiff's cause of action had been disclosed in his declaration he would necessarily be held to have no cause of action in this Court. I said that without doubt there were cases in which the Court or a Judge would give leave to plead replications on equitable grounds to avoid the effect of the defendant's pleas, but clearly not when such replication would have the effect sought to be given to the one in question. I said that it could not be upheld without the Court arrogating jurisdiction which did not belong to it, because the plaintiff, either designedly or accidentally, declared at common law matters which could not be, and were perhaps never intended to be, proved, and then abandoning his declaration, replied on equitable grounds an entirely different cause of action. As it was not pretended that the plaintiff had any legal title to the property in question, I said that their clear duty was to find a verdict in favour of the defendant, and they did so.

The plaintiff took a rule to set aside the verdict, which was argued during the present Term.

Graham, Q. C., in support of rule.—I think the verdict should be set aside, the case never having been properly submitted to the jury. *(Sedgwick, Q. C.*—Plaintiff had no legal estate in the land, and could have no greater estate in the logs than he had in the land.) An equitable replication to the seventh plea is fully justifiable. The plaintiff, having permitted the defendant to go on the land and expend money in cutting logs, should not be permitted to set up plaintiff's want of a deed. In advising in this case I relied on *Freeman* v. *Harrington*, 1 Oldright, 352. That case was the converse of this. (WEATHERBE, J.—Was there an equitable plea there?) Yes. (WEATHERBE, J.—Have you authority for an equitable replication?) The statute enables me to plead it,—chapter 94 *Revised Statutes*, section 163. I have an English authority under the same statute. (SMITH, J., refers to *Bartlett* v. *Wells*, 1 B. & S., 836. An equitable replication cannot be pleaded to a legal plea if it merely shows that the plaintiff has some right in equity which is ground for applying to a Court of Equity.) I admit that we cannot commence an action at law, and when defendant answers, set up an equitable replication, which is all that case decides. We had possession of the logs, which enables us to bring trover. The only thing that meets us is the deed. (WEATHERBE, J.—That is enough.) It is not, as I contend, bringing trover for the logs. (WEATHERBE, J.—It is enough under the evidence.) The logs are the plaintiff's. (WEATHERBE, J.—Under an agreement with the defendant which you must go into equity to establish.) If the seventh plea is bad, the defendant cannot succeed on the facts, as the facts are the same as are alleged in the plea. (WEATHERBE, J.—The defendant can only succeed on your failing to make out a case. You should have been non-suited.) As to our right to enter on the land, see *Waterman on Trespass*, vol. 2, p. 206.

SMITH, J.—After consideration we think it unnecessary to call on Mr. Sedgwick. There was no evidence of property in the goods in the plaintiff.

WEATHERBE, J.—I also think it unnecessary to call upon Mr. Sedgwick. The replication relied on is an answer to a bad plea. It is an answer to no other plea, and it is a pure

question of law. I think also that there was no license whatever. The license relied on was an implied license from a contract which was void. No argument could be made except that there was a license to be gathered from words which were relied on to make up an agreement which was void under the statute.

McEWAN *v.* OUTRAM.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided February 15th, 1882.)

Appeal from County Court under $40.—Rule must show that it is granted in discretion of Judge.

In a cause under $40, the County Court Judge granted a rule for appeal in the following form; "On hearing read, &c., &c., and on motion, I do order that A. B. have leave to appeal and an appeal is hereby granted from my decision, &c., to the Supreme Court on the following grounds." Three grounds were stated, the first being in general terms, the other two pointing distinctly to the objections relied on.

Held, That under section 14 of chap. 9 of 1878 the appeal, being in a cause under $40, should show on its face that it was granted in the discretion of the Judge, and not as an ordinary appeal, and that the rule for appeal was insufficient.

This was an appeal from a decision of Judge Johnstone, County Court Judge at Halifax, refusing to set aside an attachment. The rule for appeal was as follows:—

On hearing read the order absolute granted herein upon the 26th day of February, A. D. 1880, the order *nisi* granted herein on the 6th day of February last past, and the papers referred to therein, and all the papers on file herein, and my decision given herein, and on motion, I do order that Ernest H. Taylor, summoned herein as agent, have leave to appeal, and an appeal is hereby granted from my decision herein and said order absolute to the Supreme Court of Nova Scotia, on the following grounds:—

Because said order *nisi* should have been made absolute.

Because the Summons against said Taylor was not properly issued, there being no affidavit in support, as required by law.

Because said affidavit purporting to be in support thereof was not headed in any cause; and upon the grounds urged at the argument of said order *nisi*.

Tupper, with whom was *Graham*, *Q. C.*, appeared in support of rule.

Eaton, contra, took a preliminary objection. The appeal does not lie within section 14, ch. 9, Acts of 1878. There is no appeal from the decision of the County Court Judge in amounts under $40, but the Judge may allow an appeal in such cases when he is required to make up a statement for the opinion of the Court. No such statement has been prepared.

Tupper.—The Judge, in the exercise of his discretion, has sent the case up. It is a sufficient compliance with the statute if the grounds are succinctly stated in the rule.

WEATHERBE, J.—There is no appeal unless the Judge has sent some question here for us to determine.

Graham, *Q. C.*, refers to *Anderson* v. *Taylor*, 3 R. & C., 526. In that case it was considered that the act was complied with by a rule similar to that here and no statement was thought necessary. (SMITH, J.—That was my opinion.) Your Lordship delivered the judgment of the Court. (WEATHERBE, J.—That is a mistake. I have noticed the same mistake in several other cases where there is no authority for the statement.*

Eaton.—The only way in which they can get an appeal here is by the Judge stating a case for the opinion of the Court, which he has not done. In *Anderson* v. *Taylor* the party could get an appeal by filing a bond. In *Thomas* v. *Ray*, 2 R. & G., 135, the opinion of the Court was asked.

JAMES, J., after recess.—We have been in consultation since the adjournment of the Court. The Act reads:—"Nothing in the 25th, 26th and 29th sections of the Act hereby amended shall be construed to prevent the Judge in his discretion allowing an appeal upon any point of law or practice in any matter argued before the Court or Judge, although the amount in controversy may be less than $40, such point of law to be succinctly stated by him for the opinion of the Court of Appeal, and the Judge is hereby authorized to grant such appeals in his discretion, upon such

* It is always assumed by the Reporter that the opinion first delivered is concurred in by [illegible] of their lordships as do not express their dissent. If this assumption is correct there is [illegible]ority for the statement referred to. If not it is impossible to say what is the decision of [illegible]

terms as to security or otherwise as he shall see fit." I believe we are all of opinion that there is nothing here to indicate that this is an appeal sent up by the Judge in his discretion. It appears to be an ordinary appeal against his decision, which is not allowed by the statute in cases under $40. There is nothing to indicate that the Judge wished us to give any opinion for his guidance. It should appear on the face of the paper in what character it is sent up. Something to signify whether the Judge asked or required an opinion of this Court upon a matter of law. The appeal is dismissed.

WOOD *v.* ALLAN.

Before McDONALD, JAMES and WEATHERBE, JJ.

(Decided February 15th, 1882.)

Negligence.—Conflicting Evidence.—General Verdict sustained.

PLAINTIFF brought an action against defendants for injury to her luggage on defendants' steamship, caused by the breaking of a dummy, or side-light, and the alleged negligence of defendants' servants. Conflicting evidence was given on the question of negligence, and a general verdict was found for the plaintiff, which the Court refused to disturb.

This was an action by plaintiff, a passenger from England by the S. S. *Hibernian*, of the defendants' line of steamships for damages for the loss of her luggage. The cause was tried before WEATHERBE, J., at Halifax, in May, 1880. The goods in question were damaged by the breaking of a "dummy," or covering of a side-light, in consequence of which water was admitted by which the goods were destroyed, and evidence was given to show that defendant's servants had been negligent. A general verdict was found for plaintiff for the sum of $446.

A rule was granted to set aside the verdict as being against law and evidence and the weight of evidence, with power to the Court to direct a nonsuit, or judgment for defendants, with costs.

Ritchie, Q. C. for rule.—This case was previously before the Court, and is reported in *1 R. & G.*, 477. There is no distinction between the case now and then, and no evidence that alters the case in any respect from what it was when the last verdict

was set aside. Our evidence is stronger now than it was on the last trial. (WEATHERBE, J.—You cannot set aside the verdict on that ground.) The plaintiff can only succeed on the ground of negligence. I need not cite the cases on this point again. They are all reported in the previous case. It is expressly agreed between the passengers and owners that the latter are not to be responsible for the safe keeping of the baggage. We might be responsible for gross negligence, but no such negligence is shown. Under *18 & 19 Vic.*, chapter 119, General Passenger Act, passengers must take tickets in a specified form. Mr. Wood did not show himself capable of giving evidence in regard to "dummies." *Dodson* v. *Grand Trunk Railway Company*, 2 N. S. Dec., 405.

Tupper, contra.—There was evidence that the sea had never been known to break a dummy of this character, and there was evidence as to the probability of the accident having occurred while the vessel was leaving the Liverpool dock. The Chief Justice found specially, on many points, on the previous trial. Now we have a general verdict. (WEATHERBE, J.—Mr. Ritchie said on the former argument that if the dummy was broken and the defendants allowed it to remain so it might be different. There is pretty strong evidence that that was the case.) All we have to do is to show something that the verdict may rest upon. The jury had a great deal of evidence. The moment we prove the dummy was broken it raises a presumption of negligence. *L. R., 2 Q. B.*, 427, 428. The supposition that the dummy was broken on leaving the dock, which is the only probable explanation, is consistent with the statement that no water entered the baggage room until the vessel was some days out of port, as no water would be likely to enter until the vessel was out of the Channel and entered rough water. As to burden of proof, see *L. R., 1 C. P. D.*, 34. (*Ritchie, Q. C.*—That case was reversed.) Not on that point. In the case cited and the subsequent case it is held that where a common carrier wishes to limit his liability, the burden is on him. *9 U. C. Q. B.*, 599. On the same point *Davison* v. *Manchester Railway Company*, 5 L. T., N. S., 682; *Burke* v. *Manchester Railway Company*, 18 W. R., 694. Both these cases decide that it is on the carrier to show that he comes

within the limitation. There is no dispute that the plaintiff was a passenger per line and had a ticket. The defendants admit this and set up the condition. *6 M. & S.*, 150. Notice is not binding on the passenger unless brought to his attention. (WEATHERBE, J.—Was that under the Act?) No, but there is nothing in the Act that makes it any different. (WEATHERBE, J.—Does not the Act say the exception must be on the face of the ticket?) I deny that we got the ticket. There is no evidence to show we did. (WEATHERBE, J.—They must produce the ticket and put it in evidence. The case is entirely different from what it was before.) *Dodson* v. *Grand Trunk Railway Company* has no application.

Ritchie, Q. C., in reply.—There is no evidence here, putting the ticket to one side, that we were common carriers. We might have moved for a nonsuit. There is some evidence of a ticket, not the one in evidence, but it is not shown what it is. We contend that the ticket which forms part of the deposition was put in, and that after that it would not have been open to us to move for a nonsuit. You cannot take one part of the ticket and reject the rest. The vessel would be in rough water twenty-four hours after leaving port.

WEATHERBE, J., (February 13th, 1883,) delivered the judgment of the Court:—

It is not denied in this case, as I understand it, that if there was negligence on the part of those in charge of the ship or luggage, by reason of which the damage sued for was occasioned, the plaintiff must recover.

When this cause was before us on a former occasion, (*1 R. & G.*, 478,) the verdict had been found on these grounds, viz., because the carpenter, (Smith,) was guilty of neglect in not visiting the baggage room, and that the injury to the dummy was the result of imperfect construction, and we found that the injury to the dummy was not occasioned by the ship striking the dock in Liverpool.

There is nothing to indicate, in what we said in delivering judgment, that a general verdict on the evidence as it then stood, and before the introduction of evidence on the second

trial, would not have been sustained by a majority of the Court. The learned Chief Justice was for sustaining the verdict, and I based my opinion, in accord with the learned Judge in Equity, on the special finding. It is true that from some remarks of my brother SMITH it might have been inferred that he could not have agreed even to a general verdict. But that is all.

Now we have to deal with a general verdict, and I think there is evidence of negligence to support it. Smith, the carpenter, swears that he discovered that water was entering the ship and injuring the luggage on the third or fourth day out. And although it is contended that the owners are not to be responsible for any damage done to the luggage in this case, no communication is made of the discovery of sea water where the trunks were stored until one o'clock of the sixth day out. Then we have evidence of a knowledge by the master of injury to the dummy in Liverpool, which we are told by defendants' counsel is contradicted. All this evidence was for the jury, or the Judge trying the cause as a jury under our statute, and for that reason I think the verdict cannot be disturbed and the rule *nisi* for a new trial should be made absolute, with costs.

MCDONALD, J., concurred.

JAMES, J.—This is the second application to this Court to set aside a verdict for the plaintiff. The cause was formerly tried before Sir W. YOUNG, C. J., without a jury, who found for plaintiff for $446, and the argument and decision on a rule *nisi* to set aside that verdict are reported in *1 R. & G.*, 477. The evidence given at that trial is not before me. From the statements of it given in the report, by the counsel and the Court, I infer that it was so far different as to render it necessary for me to refer briefly to that given at the last trial, which was before WEATHERBE, J., without a jury. Verdict was for plaintiff for $446. The question at issue is, as settled by that decision, whether the damage was caused by the perils of the sea or by negligence. There is direct and positive evidence given by Smith, the ship's carpenter, that it was not caused by his negligence, and if that can be believed the injury did not happen from that cause. He was not believed on the

former trial by Sir W. YOUNG, C. J.. who, after the argument, still retained the same opinion, and dissented from the other Judges. There is not, I think, sufficient reason for discrediting Smith, except on the ground of the evidence given by Mr. Wood of what he heard the captain and officers say, which is contradicted on the trial. There is nothing improbable in what he says. He swears that he discovered the damage and found that the dummy was broken at 5 or 6 o'clock in the evening, and that he had seen the dummy that morning at 10 o'clock, when it was, as far as he could perceive, perfectly good. It is extremely improbable that this dummy had been broken so as to let in the water during the whole five or six days the vessel had been out. It would certainly have been discovered before that had such been the case, as the vessel would have been flooded with water long before. And if it was apparently good and sufficiently tight, on leaving port, to keep out the water, it appears to me it may have remained in that condition until after Smith last examined it at 10 a. m., and yet have become broken afterwards on the same day. When Smith discovered that water was coming from the steerage, and went with assistance to the place where the the baggage was injured, the water was rushing at every roll of the ship through a ten-inch aperture. A very short time, under these circumstances, would suffice to damage a very large quantity of baggage.

On the other hand, the evidence is exceedingly strong that this accident did not occur from the perils of the seas. Captain Wood, an experienced and competent person, says; "I don't think it probable that the dummy could be broken by the action of the sea without crushing in the side of the ship. It might be possible. I don't think it possible. It was broken by some hard substance, as running against the dock. The dummy would be stronger than any other part of the ship. The dummy was cast iron and not glass. The one in question was a temporary one. The work all round showed how the temporary one had been put in. * * * At the time of the year, with weather not extremely heavy, it could not be possible to break the dummy by the sea."

Captain Guildford, who has been in command of steamers, both of wood and iron, for twenty-three years, and is familiar

with the dummy described, says; "On a passage from Liverpool it would be impossible for the action of the sea to fracture such a dummy as was described. * * * I never knew a dummy broken by the sea. * * * I don't think it possible for a log to break it. It might be if a log was dashed against it."

And both of the defendants' witnesses give similar testimony. Smith says; "We had a little rough weather from time of leaving Queenstown. * * I have been in heavier weather at sea. Have never known a dummy broken before in such weather." And Captain Archer says: "I never knew of any of the old dummies ever to have been broken before."

With this evidence before him, I think the learned Judge was perfectly justified in finding that the loss was not caused by the perils of the sea. It is my firm belief that it was not. This fact has been found for the plaintiff by two Judges in succession, sitting without a jury, and I think we must accept it as an established fact in the case. If it be we have no more to do with the condition, which only covers injuries of that character.

The most probable solution of the fact appears to me to be that the dummy was cracked and injured by collision with the dock, either in going into the dock or in coming out, or perhaps on some previous voyage. It was 12 inches in diameter, of cast iron, 2½ inches thick, with a hole in the centre for the bolt by which it was fastened on the inside. It was put on from the outside, and the rim projected over the iron plating which composed the side of the vessel. It might, as it projected outside of the plating, have come in collision with the dock, without injury to the vessel's side, with a force sufficient to crack it across, and yet without sufficient concussion to be felt in so large a ship; and it would be held together and kept in place, and the crack kept from widening or letting in water or from being perceptible from the inside by the rubber washing by which the two pieces were hanging together when the injury was discovered, and it might have so remained for weeks, until it was broken up under the influence of the rolling of the ship. It is very fortunate that the actual breakage did not occur when the vessel was laboring in a heavy sea, as the aperture was ten

inches in diameter, and even in the moderate weather prevailing at the time, it was being submerged by the rolling of the ship, and the carpenter had "a good deal of trouble in replacing it," as it was put in from the outside. It is no wonder the owners have since, owing to this accident, adopted the newer and safer dummy.

This solution of the facts saves us the necessity of impugning the good faith of the witnesses, or of the owners or officers of the ship; but it does not protect the defendant from the imputation of negligence, and, as I think, very gross negligence. If this dummy was cracked by collision with the dock in coming out at Liverpool, the officers ought to have known of the collision; and if it occurred before she left the dock, it ought to have been discovered upon a thorough inspection of the ship before leaving port. No evidence has been given of such an inspection having been held in this instance. It might easily have been given had such an inspection taken place, as both the master and the carpenter have given their evidence, and they must have known the fact. Can it be possible that ships of the class of the *Hibernian*, carrying so many precious lives, are permitted to cross the Atlantic without being previously thoroughly surveyed? I hope not. At least there is no such evidence given in this case, and I think its production was necessary for the defendant's interests, to shew that this dummy, the breakage of which might have caused the loss of the vessel and all on board, was uninjured when she left the port of Liverpool.

I am of opinion that the rule *nisi* should be discharged with costs.

CALDWELL *v.* THE STADACONA FIRE AND LIFE INSURANCE COMPANY.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided February 15th, 1882.)

Amendment of Pleas refused after Verdict for Plaintiff.—Waiver required by condition to be in writing.

AFTER a general verdict for plaintiff in an action on a policy of insurance, defendant moved at the argument to add a plea setting up the defence that the action had not been brought within six months, as required by the conditions of the policy. The amendment was refused. See *2 R. & G.*, 300.

The policy of insurance contained a condition that no requirement as to proofs of loss should be waived unless in writing. The proofs of loss were defective, and the Court held that there had been a waiver, but as it was not in writing, the verdict was set aside.

This was an action brought by Samuel Caldwell and Sarah, his wife, on a fire insurance policy issued by the defendant company, the loss, if any, under which was payable to George R. Anderson, of Halifax. The writ also contained a count in trover, under which plaintiffs claimed damages for the wrongful conversion of the policy to their own use by defendants, by which plaintiffs were deprived of the use and possession of it. The case was before the Court on two previous occasions—once on a demurrer to defendants pleas, the argument on which is reported in *1 R. & G.*, 259; and again on appeal from a decision of the Chief Justice at Chambers, refusing to allow an amendment by adding pleas. This appeal is reported in *2 R. & G.*, 300. The policy contained, among others the following conditions:—

"No. 2. And if by reason of such alteration or addition, or from any other cause whatever, the company or its agents shall desire to terminate the insurance effected by this policy, it shall be lawful for the company or its agents so to do, by notice to the insured or his representative, and to require this policy to be given up for the purpose of being cancelled, provided that in any such case the company shall refund to the insured a rateable proportion for the unexpired term thereof of the premium received for the insurance.

No. 8. Damage to buildings not totally destroyed shall be appraised by disinterested men, mutually agreed upon by the assured and the company or its agents, and where merchan-

dize or other personal property is partially damaged, the assured shall forthwith cause it to be put in as good order as the nature of the case will let, assorting and arranging the various articles according to their kinds, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of such damage on each article by disinterested appraisers mutually agreed upon, whose detailed report in writing shall form a part of the proofs required to be furnished by the assured, who shall pay all fees and expenses incurred in the substantiation of the claim. A copy of the written portion of this policy to be given in the affidavit of the assured in all cases.

No. 9. All persons insured by the company sustaining any loss or damage by fire, are immediately to give notice to the company or its agents, and within five days after such loss or damage has occurred are to deliver as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and by their books of accounts or such other proper evidence as the directors of this company or its agents may reasonably require; and until such declaration or affirmation, account and evidence are produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; no profit or advantage of any kind is to be included in such claim; and if there appear fraud in the claim made for such loss, or false declaring or affirming in support thereof, the claimant shall forfeit all benefit under the policy.

No. 11. It is furthermore hereby expressly provided that no suit or action against the company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any court of law or equity, unless such suit or action shall be commenced within the term of sixth months next after any loss or damage shall occur; and in case any suit or action shall be commenced against the company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

No. 12. None of the foregoing conditions or stipulations, either in whole or in part, shall be deemed to have been waived by or on the part of the company unless the waiver be clearly expressed in writing, by endorsement upon this policy, signed by the manager of this company for Canada."

The ninth condition was set out in plaintiff's writ as the only one material to their cause of action, and performance was alleged.

Defendants pleaded, among others, the following pleas:—

5. And for a fifth plea to said (first) count, the defendant company says that the said insurance was effected, and the said policy applied for by the said Samuel Caldwell, who was then owner of said dwelling house, and the loss, if any, under said policy, was by said policy made payable to one George R. Anderson, and that after the date of said policy, and before said alleged loss, the said Samuel Caldwell conveyed all his interest in said dwelling house to one Thomas Bayers, and the plaintiffs had no interest therein, and sustained no loss or damage from the burning of said dwelling house as alleged.

6. And for a sixth plea to said count, defendant company says that the plaintiffs did not, within five days after the alleged loss or damage, deliver to the company as particular an account of the alleged loss or damage as the nature of the case admitted, according to the said conditions in that behalf endorsed on said policy.

7. And for a seventh plea to said count, defendant company says that after the alleged loss and damage, the plaintiffs, or one of them, made and delivered to the defendant company a false and fraudulent account of the alleged loss and damage, as and for such account as is mentioned in said conditions endorsed on said policy, in which account it was represented and stated that the loss and damage sustained by the said plaintiff, Samuel Caldwell, from the burning of the said dwelling house were to the amount of four thousand dollars, with the intent to induce the defendant company to pay him or the plaintiffs the said amount of $4,000, whereas the said dwelling house was not of the value of $4,000, and was not damaged to that extent, and the said Samuel Caldwell did not sustain damage by the alleged fire to that

amount, as plaintiffs well knew, and they were thereby guilty of fraud in making the claim under said policy, or making false declarations or affirmations in support thereof within the meaning of said conditions endorsed on said policy.

8. And for an eighth plea to said count, defendant company says that in the application for insurance mentioned in said policy, the said plaintiff, Samuel Caldwell, falsely represented that the said dwelling house cost and was of the value of $6,000, when in truth it cost him only about $3,000, and was not worth more, which was well known to said plaintiffs, and by such false representations and fraud of the plaintiffs, or one of them, the defendant company was induced to make said policy.

10. And for a tenth plea to said count, defendant company says that before the alleged loss or damage, the defendant company, by notice to the plaintiffs or their representative, terminated the insurance effected by said policy, in accordance with the said conditions endorsed thereon.

11. And for an eleventh plea to said count, defendant company says that before the alleged loss or damage the defendant company terminated the insurance effected by said policy, and the plaintiffs delivered up the said policy to the defendant company to be cancelled, and it was cancelled accordingly before said alleged loss.

13. And for a thirteenth plea to the second count of plaintiff's writ, the defendant company says that said company did not convert to their own use, or wrongfully deprive the plaintiffs of the use and possession of the said policy.

14. And for a fourteenth plea as to said second count, defendant company says that the said policy is not the property of the plaintiffs, but of the defendant company.

Plaintiffs having obtained leave from a judge replied, joining issue on defendants pleas, and then as follows:—

2. And for a second replication to the fifth plea by like leave, plaintiffs say that they or one of them was at the time of their making said insurance the owner of said house and premises, and although the said building and premises were afterwards formally conveyed to one Thomas Bayers, yet before the said loss the said Thomas Bayers reconveyed the same to the said Sarah Caldwell, then and still being the wife

of the said plaintiff Samuel Caldwell, and the said Sarah Caldwell from thenceforth and from the making of said policy, and until and at the time of the said fire and the said loss was the owner thereof and interested therein.

3. And for a third replication by like leave to the sixth plea, plaintiffs say that the defendants before action brought, waived and dispensed with all necessity on the part of the plaintiffs, to make or furnish any further or more particular account of said loss than had already been furnished by said plaintiffs to the said company.

4. And for a fourth replication to said sixth plea, plaintiff's by like leave further say, that they did furnish to the said defendants, due, proper and sufficient proofs of loss containing as particular an account of the said loss or damage as the nature of the case admitted, which proof said defendant company accepted and received as sufficient compliance with the conditions in said sixth plea referred to, and thereby relieved, exonerated and discharged the said plaintiffs from furnishing any further or other proof of said loss or damage.

5. And for a fifth replication to said sixth plea by like leave, plaintiffs say that the defendants by their duly authorized agent in that behalf, for divers good and sufficient considerations in that behalf, waived and dispensed with all necessity on the part of plaintiffs to furnish to said defendants within five days after said loss, as particular an account of said loss or damage as the nature of the case admitted, and otherwise exonerated and relieved the plaintiffs from compliance with the condition referred to in said sixth plea, and plaintiffs further say that in accordance with such waiver and release, the defendant company accepted and received as sufficient in that behalf the account of said loss furnished to them by the plaintiffs within a reasonable time after said loss occurred, and said defendant company, after receiving said proof of loss and said account, notified the plaintiffs that they disputed and would resist the payment of said loss, solely upon the ground that the said policy had been cancelled, whereby and by reason of said defendants having limited their defence to the said alleged cancellation, and by not setting up that said account or proofs of loss were insufficient, or were not furnished in time or in accordance with the conditions in said sixth plea

referred to, they waived all right on their part to set up as a defence to this action any want of or defect in point of form, sufficiency or time. in said proofs of loss.

Defendants joined issue on plaintiffs' replications, and for a second rejoinder as to the second, third, fourth and fifth replications, said that the alleged waivers were not clearly expressed in writing by endorsement on said policy, signed by the manager of said company for Canada, as required by the conditions endorsed on said policy.

Plaintiffs joined issue on the second rejoinder, and surrejoined as follows:—

And for a second surrejoinder to the defendants' said second rejoinder, plaintiffs say that the defendants, at the time of the happening of the loss of the premises in the declaration mentioned, were in possession of the policy of insurance in this action declared on, and kept and detained the said policy ever since, and refused to deliver up the same, although the plaintiffs demanded the same within the time limited, to make and give the proofs of loss herein, and for the purpose of enabling the plaintiffs to make and furnish the said proofs, and plaintiffs were not aware of the conditions on said policy endorsed, requiring waivers of proof of loss to be in writing endorsed on said policy, and signed by the manager of the defendant company for Canada, and they were prevented by reason of the wrongful detention of said policy by the defendant company from acquiring knowledge of the said conditions, and from complying therewith.

The cause was tried at Halifax, before Mr. Justice JAMES. It appeared from the evidence that the property was insured in the defendant's office by George R. Anderson, acting for and on behalf of Samuel Caldwell, one of the plaintiffs. Subsequently to the issuing of the policy, the agent of the company, Greer, acting under instructions from the company, mailed the following notice to policy-holders:—

HALIFAX, June 28, 1877.

Mr.

I have to inform you that the Stadacona Insurance Company has ordered me to notify policy-holders to insure elsewhere, as the company has decided to wind up. You will

therefore take notice that your policy of insurance is cancelled from this date. Unearned premiums will be returned hereafter.

Yours, &c.,

G. M. GREER,

Agent.

A copy of this circular was sent to Anderson, who received it on the day on which it was dated, and on the same day took the policy to Greer, and left it with him. A few days afterwards, and while the policy was still in the hands of Greer, the building insured was destroyed by fire. The evidence as to the circumstances under which the policy was left with Greer was as follows :—

George M. Greer, agent of defendant company.—Remember fire. Was agent then and for about two months after. I was then and am still agent of Western Insurance Company. There was a Board of Local Directors for defendant company. John S. Maclean and H. H. Fuller were two of them. I issued this policy, I think. I sent it to Mr. G. Anderson. Just before fire on 30th June, 1877, I obtained the policy from Mr. Anderson's own hands. I sent him a notice on 28th. He came to my office with this and two other policies, and said, "Put those in the Western." That was all he said. It was not put in Western before fire. Gave no receipt or policy, and received no premium. Made no contract. This was the only conversation with him before the fire. No conversation with Caldwell until after fire. Sent no notice to Caldwell same as I did to Anderson above mentioned. Did not know Caldwell in the transaction, but knew, of course, that his name was in policy, and who he was. Immediately after the fire all the papers in my possession were sent to head office at Quebec. After fire M. H. Richey called and asked for policy; Anderson came also and demanded it. Caldwell was with him. I asked local board after fire if I should give it to them, and they referred me to head office. I applied by writing to head office. They did not answer, but the manager came down. I submitted all the facts to him, and asked him if I should give up the policy, and he said, "we must hold on to it and not give it up." His name was George J. Pyke. He took it

away with him, and I never saw it until to-day. I think the only ground urged was that it was transferred to the Western. Pyke said to me "we are not liable, it is transferred to the Western" or to that effect. The company did not object to the proofs of loss. I don't remember if the proofs of loss came to me before Pyke left. He was off and on here a few weeks after the fire. The St. John fire was 28th June. I received the proofs of loss and did not object to them. I know of no other objection except the transfer. My agency continued a month or two months after proofs were received. I made no objection to them.

Cross-examined by Mr. Ritchie.—I had no instructions from the office in reference to this claim. I did not and could not communicate to insured that the claim would be paid. I made no statement to Anderson or M. H. Richey as to proofs of loss, whether sufficient or not; had not authority to do so. Anderson said it cost Mr. Fishwick $6,000. I sent Anderson a notice, of which this is a copy. He brought the policy in answer to this note on 30th June. The two other policies were in the Stadacona. I did not give him receipts in the Western because I had no blank forms left. They were changing so fast that day that I got out of receipts. The Western refused to take one policy. I had made no return of this application before the fire. The interim receipt binds the office until it is refused by the company. I would have given a receipt if I had had receipts. I told Anderson I would put it in the Western. I received the proof of loss the day it is dated (20th July) or soon after. Conversed with Caldwell after the fire about cost of the house. I took a memo. of what he said at the time. He said the whole cost to him was about $2,800.

Re-examined.—I got receipts afterwards,—after the house was burnt down. The office never asked to accept risk on that account. I assume Anderson came in consequence of notice, because he came with the policies, as others did. I sent the notices in envelopes, and sent them by my boy to the post office. I and my two or three clerks put in the notices, and addressed them, and put on the stamps. There were 800 or 900. Can't say I mailed one of them. When he brought the policies there was no return premium paid, nor at any

time to my knowledge. Return premiums were paid twelve or eighteen months after. Can't say Anderson got any. The only reason for sending the notices, so far as I know, was that the company were in financial difficulties. But for that we would have continued the risk. We thought it a good risk.

George R. Anderson.—I received this circular June 28, 1877, and on same day I took the policy there.
there.

Cross-examined by Mr. Rigby.—I insured premises under authority of Caldwell, and charged him premium. Never authorized me to surrender policy. Never agreed to surrender it. I left policy with Greer to enable him to take description of the property, not for purpose of surrendering it. Never informed Caldwell up to time of fire of the notice I had received. After fire, probably next month, called on Greer with Caldwell. I told him he held policy in trust for Caldwell and me. I demanded it first, and he refused to give it up. No return of premium offered me before action. I received this paper from Greer 9th April, 1878. Before that I received no offer of return premium. When I applied for insurance had conversation with Greer as to value. Told him Fishwick estimated cost at $6,000, that I wished value to be fixed upon and no fault found afterwards, and he had better consult some of his directors. He came back same day, said he had seen Maclean and Fuller in reference to value, and they would take the risk. I told him I had a valuation made by two parties before lending my money, (I lent $4,500,) and they had valued house at $4,000 and land at $2,000.

Re-examined by Mr. Ritchie.—I told Greer when I got notice he was acting unfairly by compelling us to change the policies on a half holiday. I said I must have them changed. He said the Western was the best office in Canada. I told him I would leave the policy for him to get the description. I did not get the other Stadacona policies back. Did not ask for them. I am positive I told Greer I left policies for him to get description.

M. H. Richey, *sworn.*—Was retained to collect the insurance after fire. Immediately after. Waited at once on Greer to ascertain position, as policy was not in the hands of

plaintiff, and found that Greer had already notice of loss. He said he supposed I had called on him in reference to that. I gave him notice. Asked him if he had policy. He said he had. I asked him to give it to me to make the necessary proofs. He declined to do so without communication with his directors, and requested me to wait, as there was no necessity for my doing so. At his request I delayed making any proofs until he should communicate with his directors. I called very shortly again, and was informed by him that the directors here would not authorize delivery without communicating with the head office at Quebec. I called frequently to ascertain the decision of the head office and received no satisfactory answer, until finally, thinking sufficient time had been afforded, I put in such proof as I could without the policy. I did not put the proof in before because I was awaiting the decision of head office, whether the defendant company would return the policy to us or not, or whether the transfer of the risk to the Western was effected. I did not receive payment of the claim; payment was refused on the ground that the company had ceased to be liable, not on any other ground.

Cross-examined.—I think I went to office the next day after the fire. I went *immediately*. Can't be positive whether it was next morning or not. I went as soon as I was spoken to. I don't think I applied to Mr. Greer for copy of condition of policy. Proof could have been put in at once as well as it was put in afterwards. I suppose I might have seen a similar policy. Greer gave me a reason for not paying loss. He told me why loss was not paid. In our first conversation he did not say policy would not be paid. I think the first distinct refusal to pay that I had was contained in a note from Fuller, about end of November or beginning of December. Can't say that Greer ever told me positively that loss would not be paid. Greer asked me to delay putting in proofs. He said I had better wait until he had corresponded with the company. The ground of delay was largely to hear whether the Western would recognize the claim, so as to know what company to put it into. Had no conversation with Fuller until long after proofs were put in. I cannot find the note fuller sent me. It was an extract from a letter he

had received. Had an interview with Fuller and Maclean after proofs in. They did not tell reason of refusal. No refusal was made at that time. Fuller's note was afterwards. Had no further conversation with Maclean. I don't remember seeing the circular. I understood from Anderson that he got the circular. I was under the impression that a much longer time was allowed. I don't think I received any intimation whatever that only five days were allowed. I can't swear whether I was aware within five days whether proof was to be put in within five days or not. I had never seen a policy that allowed so short a time. Having given notice of action to Greer, I was waited on by Fuller and Maclean as directors of the company. They told me I need not be afraid of my client losing his claim; that their company would not see me lose it, and that they considerd the Western liable. I told them I considered the Stadacona liable, and had so advised my client; but as the question was between the two companies, if they would give me a guarantee I would proceed against the Western at their request. They left to communicate with their company, and the extract Fuller sent us was the answer.

A nonsuit was moved for on the grounds following:

1. Anderson should have been plaintiff.
2. Policy cancelled under condition 2.
3. No interest in plaintiffs. Caldwell had conveyed.
4. 9th condition not complied with. Proof not put in in time.
5. None of these conditions can be waived,—waiver not in writing.
6. Under 11th condition, six months a bar; action not brought for a year and more.
7. Under 9th condition, affidavit of Caldwell not true as to ownership, also as to amount of loss.

The learned Judge declined to nonsuit, and found a general verdict for plaintiff for the amount claimed, with interest. Defendant took a rule to set the verdict aside as against law and evidence and upon the points taken upon motion for nonsuit.

Attorney-General, in support of rule, renews the motion made on the first day of term to add a plea that the action

was not brought within six months, and cites Harrison's Com. Law. Proc. Act, 321, and cases there cited. We are entitled to amend on affidavit after verdict. There is no case on this point, except the general principle in regard to amendment. There was an application to amend outstanding at the trial. (SMITH, J.—I think it would have been better if you had applied for the amendment at the trial. If the Judge then refused it that might be a good answer to the objection.) The fact was brought to his attention that there was an application outstanding. (The COURT, after conference, declined to allow the plea to be added.)

We rely on the pleas of want of interest, false account of the loss, misrepresentation of the cost, cancellation of the policy, and notice under the condition of the policy. The insurance was effected on the 10th August, 1875. The plaintiff transferred his interest to Thomas Byers on the 7th February, 1876, who re-conveyed to Sarah Caldwell, the wife of the plaintiff, who, at the time of the loss, merely held under his wife. The house was burned in July, 1877. This interest of the plaintiff would not have enabled him to insure in his own name. It was a material change in the risk. (*Meagher, Q. C.*—That is not pleaded.) We contend also that the action should have been brought by Mr. George R. Anderson, the insurance having been effected for his benefit. The proofs of loss were insufficient in respect of the time when they were given, and the absence of the certificate required by the policy. The company had the right to terminate the policy at any time during its currency under the conditions, and did so by notifying Mr. Anderson. They had lost heavily on account of the Quebec fire, and being unable to pay further losses, determined to wind up their business, paying unearned premiums. Anderson surrendered his policy to Mr. Greer, who was agent of the Western company and of the Stadacona, for the purpose of having a policy drawn up in the former company. I think an action would be sustainable against the Western company for not giving a policy, as it seems to me there was a contract with that company for insurance, and Mr. Greer had the unearned premium in his hand. (WEATHERBE, J.—It was a most dishonorable thing on the part of the Western company and their agent. SMITH, J.—I suppose the agent was

constrained to act as he did by the company. JAMES, J.—The people should protect themselves by refusing to insure in the Ontario companies.) I think the case of the plaintiff here against the Western company is stronger than the plaintiff's case in *Robertson* v. *Dudman*, 1 R. & C., 50. The only thing Greer required to do to bind his company was to fill up the receipt for premium, and the only reason why he did not do this was that he had run out of blanks. The contract was complete. On the point that the action should have been brought by Anderson, see *Brush* v. *The Ætna Insurance Company*, 1 Oldright, 459. As to insufficiency of proof of loss, *17 U. C., Q. B.*, 327; *3 R. & C.*, 119, 176. (WEATHERBE, J.—It is admitted that it was not in time. The answer is that it was waived.) Under the policy there could be no waiver unless endorsed in writing on the policy. *28 U. C., Q. B.*, 316; *13 U. C., Q. B.*, 237; *25 U. C., Q. B.*, 119; *5 A. & E.*, 58. Leaving Mr. Anderson out of the question, the plaintiff can only recover in right of his wife. *2 Bennett*, 60. The allegation and proof is that Caldwell and his wife were both interested, while the contract is made with only one of them.

Meagher, Q. C., contra, cites *1 R. & G.*, 159, and *43 U. C., Q. B.* 556. The latter case is an authority on the point that the case need not have been brought in the name of Anderson, and was properly brought in that of Caldwell. (WEATHERBE, J.—I don't see how a party can sue without showing an interest, still less where he shows he has no interest.) In *28 U. C., Q. B.*, the condition was not as to proof of loss, but as to the subject matter of the insurance. Here the local board of directors have expressly promised to pay, and they are estopped; after having promised to pay, it is not open to them to turn round and say; "You have not given us proof of loss." (WEATHERBE, J.—The promise is conclusive in your favor if it is in writing.) Then there is no such thing as estoppel by conduct. It was impossible to make proofs of loss, &c., without having the policy. The company confined their objections to the ground that the policy had been cancelled. They did not object to paying on the ground that there were no proofs of loss. (WEATHERBE, J.—You never requested to have the policy endorsed.) The company asked us to delay

putting in proofs. It was a trap. (WEATHERBE, J.—It was a trap you agreed should be set. Under the policy every waiver must be in writing. JAMES, J.—Cannot the company estop themselves from taking advantage of the failure to put in proofs. *Attorney-General.*—Not under the clause of the policy which requires the estoppel to be in writing. JAMES, J.—As to the failure to put in proofs under the clause it only says that until they are put in they cannot sue. WEATHERBE, J.—Why are the five days required? *Attorney-General.*—The five days are required in order that investigation may be had at once.) It is not a condition precedent that it is to be given within five days. We admit it is a condition precedent that it is to be given before action. The plea only raises the issue as to the "particular account," not as to its being given within five days. Cites *Clarke*, 212, 236; *17 Grant*, 213, as to giving notice. If we are not entitled to recover for the loss, we are at all events entitled to recover under our count in trover for the policy. We are entitled to recover damages to the amount we could have recovered under the policy. *Mayne on Damages*, 294. We are in the same position as a party seeking to recover a promissory note or a bank pass book. *10 M. & W.*, 576. As to waiver see *Clarke*, 141; *7 Grant*, 130; *3 Bennett*, 210; *4 B. & P.*, 438; *4 Bennett*, 741, 742. (SMITH and WEATHERBE, JJ.—There is undoubted proof of waiver here; but it should have been in writing under a condition of the policy.) As to the damages being excessive under the trover count, there is no such ground taken in the rule. As to plaintiff's right to recover after parting with the property, *Clarke*, 63; *3 A. & E.*, 278–9; *2 Bing. N. C.*, 771. Cites *Bates' Digest*, sections 36 and 41; *Id*, p. 520, and following pages as to preliminary proofs.

Attorney-General, in reply.—Plaintiffs cannot recover damages in trover, because it appears in evidence that the policy would not have been available to them to recover anything under it; therefore they are not entitled to damages for withholding it. On that point *2 Moore P. C.*, 247. The contract was not with Sarah Caldwell at all, yet she is one of the plaintiffs who have a verdict here. (WEATHERBE, J.—She may be entitled to this paper, to have an assignment of the

policy.) If any one were entitled to it in that way, it would be Anderson. If it was not proved that the demand for the policy was made within five days, the trover count does not avail. (WEATHERBE, J.—But he may be entitled to his policy even if it had expired.) If plaintiffs were entitled to a cent, and got $4,000, we should have liberty to amend our rule. Under the second condition of the policy, defendants are entitled to cancel the policy by notice, and to have possession of the policy. Under this policy Anderson was the person beneficially interested and the party entitled to notice. I submit that trover will not lie in the case of deeds and other documents which cannot be converted to a man's use. Negotiable instruments may be converted to a man's use. The case cited by the other side from 43 *U. C. Q. B.*, is that of a policy on goods, different from this, where the mortgagee of a house is the party entitled to recover. The necessity of waiver being in writing is pleaded by us, and simply traversed by plaintiffs. If the 12th condition were not there, the conditions cannot be waived by parol, being part of a document under seal.

WEATHERBE, J.—I think waiver has been made out, but not in writing, as distinctly required by 12th condition. I also think the damages excessive. I would not be disposed to consent to amendment; however, I think the action under the trover count cannot be sustained.

Meagher.—All I ask is that your Lordships take time to consider it.

WEATHERBE, J.—I must say that if the company expect to do business in the Province, I don't see who could have confidence in them if they repudiate this claim.

JAMES, J.—I have very reluctantly allowed myself to come to the conclusion that plaintiff cannot recover.

Meagher.—I must ask for reasons, because I have not the slightest doubt the plaintiff will appeal. I understand your Lordships are giving judgments. I ask the reasons, so that I can have them embodied in the case when it goes to Ottawa. If reasons are not given the party has to make affidavit.

WEATHERBE, J.—We have given reasons.

SMITH, J.—That is the view I take of it.

JAMES, J.—I agree with Mr. Justice WEATHERBE on the subject of waiver.

Meagher.—I wish here to bring to your Lordship's notice a copy of an affidavit served on me yesterday. I had to prepare affidavits to meet it. As the amendment is refused, I think I am entitled to costs.

Attorney-General.—No rule *nisi* was granted us; I don't think therefore he is entitled to costs.

WEATHERBE, J.—It was a distinct motion; though they were not called upon they had to be ready.

Attorney-General.—They did not need to be ready, as I had no rule *nisi*.

WEATHERBE, J.—He saw fit to be ready to meet that distinct motion here to-day, and it was a distinct and separate motion. I think he ought to have costs of that motion.

Meagher.—I am quite satisfied there has been an omission to print the surrejoinder pleading waiver of the 12th condition. If it would make a difference in the judgment of the Court, I think I might produce it.

SMITH, J.—If that were true, I should feel inclined to hesitate, and consider the subject.

JAMES, J.—So should I.

WEATHERBE, J.—We have delivered judgment in this case as printed. If you came before us under a special case, showing a different cause, we would be very slow seeing you have no remedy. We must leave that for a distinct application.

TROOP ET AL. *v.* ANCHOR MARINE INSURANCE CO.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided February 16th, 1882.)

PLAINTIFFS brought action on a policy of Marine Insurance, which contained a clause providing that in case of dispute the claim should be submitted to arbitrators. Defendants contended that the plaintiffs had no insurable interest, and the dispute was, according to the terms of the policy, submitted to arbitrators, who made an award in favor of the plaintiffs.

Held, That the Court could not go behind the award to ascertain whether plaintiffs had an insurable interest.

This matter came before the Court on a case prepared in an action on a policy of marine insurance, and an award under the policy:—

David M. Dickie, the owner of the barque *J. E. Woodworth*, being indebted to the plaintiffs in 1869 in the sum of $16,000 for supplies and advances furnished by them towards her construction, to secure said debt, gave to George J. Troop, a mortgage, the amount of which was secured by insurances effected by plaintiffs for that purpose.

In July, 1878, the indebtedness of Dickie to plaintiffs secured by said mortgage, having been reduced to about $4,000, the insurance on the vessel in favor of plaintiffs did not exceed that amount. About the last mentioned date the *J. E. Woodworth* arrived in this Province in a damaged state, and, as she required a large outlay for repairs, her owner applied to plaintiffs for supplies for such purpose, whereupon plaintiffs furnished Dickie with money and supplies and charged the same to mortgage account.

The vessel was then loaded for the Falkland Islands, the freight to be earned on the voyage amounting to between $5,000 and $6,000, out of which, when earned, it was agreed between plaintiffs and Dickie, that plaintiffs were to be paid for their last advance. Plaintiffs thereupon increased the insurance in their favor to $6,000, by an additional policy in the defendant Company for $2,000, which was the policy declared upon in this suit.

Plaintiffs were not charterers of the vessel, and made no advance on the freight to be earned on said voyage. Before completion of the voyage insured under the policy declared on,

the vessel and cargo became a total loss by a peril insured against and the registry of the vessel was thereupon cancelled in the registry of shipping at Halifax on the 17th day of March, A. D. 1879, eight shares in the vessel at the time of the loss being owned, as appears by said registry, by William J. McNeilly, to whom the same had been transferred by said David M. Dickie by bill of sale dated March 8, 1873, the said David M. Dickie being still the owner of the remaining fifty-six shares, and the whole sixty-four shares being still subject to said mortgage to said George J. Troop, as aforesaid.

At the time of said loss the following insurances were upon said vessel, her freight and cargo, in addition to the insurance sought to be recovered in the present action, viz.:—

On hull.—$2,000 in the Truro Marine Insurance Company (the vessel being valued in the policy of that company at $10,000); $3,000 in The Home Marine Association of Pictou, and $1,000 in The Western Assurance Company,—said vessel being valued in the policies of the two last-named companies at $8,000.

On freight.—Insured in St. John, N. B., $6,000, and in Annapolis $2,500.

On cargo.—Insured in Boston, $5,800, and in the Western Assurance Company $750.

Plaintiffs, in accordance with the conditions endorsed on said policy, duly delivered at the office of the defendant company proof in writing of the loss and interest, together with an adjustment paper.

The defendant company refused to pay the claim of plaintiffs under said policy on the ground only that they, (the plaintiffs), had no insurable interest in the subject matter of insurance, and a difference having therefore arisen between them on that point, the plaintiff and defendants, in pursuance of the condition in that behalf endorsed on the policy, appointed Henry Lawson and Henry William Eddis arbitrators to decide upon the matters in dispute by writing. The said arbitrators appointed the Honorable Robert Boak as third arbitrator, by writing signed by them, and said three arbitrators having duly heard the parties and their witnesses, two of said arbitrators, on the fourth day of June, A. D. 1879, made their award, from which the third arbitrator dissented.

In the case submitted for the opinion of the Court the defendant company claim that plaintiff had no insurable interest in the subject matter of the insurance, and that they could avail themselves of that defence notwithstanding the award, which they alleged was not in accordance with the terms and conditions of the policy and the laws of Canada. Plaintiffs contended that the award was conclusive on that point but even if the defendants could go behind the award, the plaintiffs had such insurable interest.

The questions for the opinion of the Court were:

1st. Can the defendants go behind the award and call upon plaintiff to prove insurable interest? If not, judgment is to be entered for plaintiffs against defendants for the amount insured, with interest and costs.

2nd. If the Court should be of opinion that the defendants can go behind the award, then upon the foregoing facts, if the Court should be of opinion that the plaintiffs had an insurable interest sufficient to entitle them to recover under said policy against the defendant company, judgment will be entered for them against defendant company for the amount insured, with interest and costs, but otherwise for the defendant company against plaintiffs, with costs.

Ritchie, Q. C., for defendants.—The award is not good on the face of it, without extrinsic evidence. The submission was made "under the provisions of the policy," which require the arbitrators to find a sum, which they have not done here. (WEATHERBE, J.—The case says only one point, insurable interest, was submitted.) If we go to admissions in the "case" to shew that the award is good, we have a right to look at other statements in the "case" to shew that it is bad. The award must be good outside of the case. The facts admitted in the case show that the award is illegal. Cites *3 C. B., N. S.*, 189; *L. R., 6 Eq.*, 429. The last case was one where the arbitrators were mistaken on a legal principle, which went to the whole basis of the award, (WEATHERBE, J.—There was a similar mistake in *Oakes* v. *City of Halifax*, which the Appeal Court at Ottawa decided could not be inquired into.) *L. R. 5 H. L.*, 418; *5 Bing. N. C.*, 187; *2 G. & J.*, 114; *3 East*, 13. The Court is to assume that

the facts submitted in the case were the facts before the arbitrators. We say that we submitted to the arbitrators the facts set out in this case, and asked them to decide whether plaintiffs had an insurable interest. We say that upon that state of facts their decision must have been wholly based upon a mistake in law. *Scott* v. *Avery*, 5 H. of L. C., 871, shews that a policy can, by its conditions, make an award a condition precedent to the bringing of an action. If the award was bad, the plaintiff could not have had an action, because there would have been no award; hence counsel agreed to submit to the Court, if we could go behind the award, and show the the facts that were before the arbitrators. Assuming we can go behind the award, there was not an insurable interest in the plaintiffs. We admit that if, under the state of facts here, the arbitrators were justified in finding as they did, the Court need go no further, but may give judgment against us. The advance here was for money to repair the ship. *Lowndes on Marine Insurance*, section 32, ff; *11 C. B.*, 51. The insurance here is on advances, and the case last cited shews that such a mere debt cannot be the subject of insurance. See also *13 C. B.*, 417. In this case it was admitted that if there had been a mere loan, there would have been no insurable interest. It may be said these advances, being for necessary repairs, were a lien on the ship, but in a case reported in 4 P.C.C., 461, it was held that they are not a lien until the ship gets into the Admiralty Court. (WEATHERBE, J.—Apart from its legality, is not this an immoral defence? JAMES, J.—It is gambling.) The assured applied for an insurance on advances, and framed their application so as to lead the insurers to believe it was for advances on freight. The mortgage interest of the plaintiffs is not covered by this policy at all under its terms. The mortgage had been paid off from $16,000 to $4,000, and could not be extended by parol to cover any further amount. *Washburne on Real Estate*, 561; *Hilliard on Mortgages*, 489. In one of the cases just cited, a bottomry bond was defective as such, and though it constituted a binding agreement between the parties, it was held that the holder of the bond had not an insurable interest.

Attorney-General, contra.—It is sufficient if we can shew an equitable mortgage. There being no other incumbrance

intervening, the owner could not, in the face of his letter directing the amount of these advances to be charged, not against him, but against the mortgage account, set up that the advances were not included in the mortgage. *Jones on Mortgage*, sections 943 to 948. The contention as to the vessel not having been insured is a new one, not submitted by this case at all. The policy here may be read to cover hull, cargo, or freight, and if we had an insurable interest in any of them, we are covered. It is admitted in the case that these advances were to be re-paid out of the freight of that voyage. We had therefore an insurable interest in the freight. The freight, in so far, was assigned to us. If it was a mere debt of the owner, we would not have an insurable interest, but the owner here was not personally liable. The case cited from *11 C. B.*, 51, was that of a master in a foreign port who pledged his owners' credit. The creditor could not insure, because he had no lien. As to going behind the award, the distinction is drawn in all the cases cited between getting at the submission and getting at the facts before him; the latter cannot be done. This is not a motion to set aside the award. This award could not be set aside without making it a rule of Court, and it is doubtful if it could be made a rule of Court. (WEATHERBE, *J.*—My only difficulty is as to the condition of the policy that action "shall be brought only for such sum as the arbitrators shall award," and no sum is named in their award.) The whole clause of the policy containing that condition refers only to matters in dispute, and the amount here was not in dispute. The case cited from *5 Bing. N. C.*, 187, has been virtually overruled. See *Russell on Arbitrations*, 296, citing the case in Queen's Bench from the *Law Journal*, The case cited from *3 East*, 13, is commented upon in *Russell*, p. 304. The case from *3 C. B., N. S.*, is really in our favor. Cites *5 American Reps.*, 549; *1 Taunton*, 8; *9 Grant*, 387; *4 U. C., Q. B.*, 146.

Ritchie, Q. C., in reply, cites *1 Fisher*, 262.

The COURT.—We are to look at the award and the submission as admitted in the case, to see if we can go behind the award; if we can, and then only, we are to look at the

other facts set out in the case. We think you cannot go behind the award.

WEATHERBE, J.—If we had to look into the question of interest, I would not be ready to decide at once, but I have no doubt the award is conclusive, because we have had the question often before us; and it has been once decided on appeal from us at Ottawa.

Judgment for plaintiffs.

HUBLEY *v.* BOAK.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided February 17th, 1882.)

ASSOCIATED counsel has no right to be heard if, on the opening, the Court deems it unnecessary to call upon respondent.

This was an appeal from the judgment of the County Court, at Halifax. The action was for assault and false arrest and imprisonment.

P. C. Hill, Jr., (with whom was *Tupper*), opened the case for appellant.

The COURT considered that the question was one of weight of evidence, and reserved judgment, announcing that they would let the respondent's counsel know if he was desired to address the Court.

Tupper claimed the right to be heard in support of the appeal, even should respondent's counsel not be called on, contending that no authority could be shewn to preclude him from doing so.

WEATHERBE, J.—We decided this question yesterday in another case, after consulting the only other Judge whom we could consult, the Chief Justice.

Appeal dismissed.

McCURDY ET AL. v. HARVEY ET AL.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided February 21st, 1882.)

A. B. and C, describing themselves as Overseers of Poor for North River, brought action against D., E. and F., described as Overseers of Poor for Brookfield, for the maintenance of a pauper. The Act of 1876 reduced the number of Overseers to be appointed for townships from five to three, but the Sessions of the defendants' township appointed five, and notice was given to one of the five so appointed, who was not made defendant in the action.

Held, That notice was necessary to enable plaintiff to recover, and that the notice in this case was not given to the proper parties.

This was an action brought in the County Court for District No. 4 by Augustus McCurdy, William N. Dickson and John A. Lynds, describing themselves as "Overseers for the Poor for the District of North River, in said County," against Jacob Harvey, Matthew Sanderson and Enos Boomer, described as "Overseers of the Poor for the District of Brookfield, a body corporate."

The plaintiffs, in their writ, claimed that the defendants were indebted to them for the board and lodging of one Barnabus McNutt, a pauper, chargeable to the Poor District of Brookfield.

The cause was tried before G. A. Blanchard, Esq., County Court Judge for the District, at Truro, December 21st, 1880, when, on the conclusion of the plaintiffs' evidence, a motion for nonsuit was made, on the following among other grounds:

1st. The action is not properly brought. It should be brought in the name of the corporation. *Dicey on Parties to Actions*, 183.

2nd. There is no proof of notice to Overseers of Brookfield that they would become chargeable. If there is proof of any Overseers of Brookfield being appointed, there is proof of five, of whom Hamilton is the fourth on the list, whereas the law provides only for the appointment of three. *Revised Statutes*, 4th Series, chapter 33, section 2, amended by Act of 1876, chapter 17, section 1.

5th. A notice to one of the Overseers of Brookfield would not bind all.

7th. The action in this case is for goods supplied to a pauper, in one Poor District, alleged to have a settlement in

another, by the Overseers of the former against the Overseers of the latter. There is no provision in the statute for such action.

8th. There is no evidence to show that the goods supplied to the supposed pauper were necessaries for his support. There is no evidence whatever of the kind of goods supplied.

The Judge being of opinion that the plaintiffs ought to become nonsuit, gave judgment accordingly, with leave to plaintiffs to take a rule to set the nonsuit aside.

Tupper, in support of appeal, cites *2 H. Blackstone*, 559, where Churchwardens sued by names of individuals and description. We have sued the body corporate. The defect here, if any, is one to be taken advantage of by plea in abatement as a misnomer; secs. 93 and 94 of Ch. 94, R. S. *1 Bligh*, H. of L. Cases, p. 9, shews that the adding of the individual names is mere surplusage.

Meagher, *Q. C.*, contra.—The individuals here are sued as individuals, and the words, "Overseers of the Poor," &c., are mere words of description.

The plaintiffs should be nonsuited on the merits. The law reduced the number of Overseers from *five* to *three* in 1876. The Sessions, subsequently to the Act of 1876, elected *five* Overseers for defendant's township, and the only notice from plaintiffs in regard to the pauper for whose support compensation is claimed, was given to one of the *five* not sued here, the writ summoning only three.

There is a plea denying that the individual defendants were the corporation; and the proof of the selection of Overseers is altogether defective. In the first place the grand jury named *ten* persons from whom they were to be selected, while the Act of 1876 required *six* only to be named for that purpose.

There is no liability of one township to another, or to an individual supporting a pauper, until after notice and request in writing to the Overseers, under sec. 18, ch. 33, R. S., and there is no proof of notice here to the defendants. *1 Burrow's R.*, 446.

Cites *Maxwell on Statutes*, 46. The appointment of more than the legal number of Overseers is bad.

The case cited from *Bligh's H. of L. C.*, was an Equity case, in which the individuals named in the bill not only described themselves as being a corporation, but set out that the relief sought was for the corporation.

Tupper, in reply.—Independently of the statute, if we have brought our action in the proper manner, we have a right of action at common law under an implied assumpsit, against the district where the pauper had a settlement. The Overseers are indictable if they allow the pauper to die for want of aid; therefore, they are liable for his support. (McDONALD, C. J.—They are only indictable for the pauper dying for want of aid in their own district. RIGBY, J.—You can only recover for relief given after notice and request under section 18 of chap. 33.) The words "after notice and request" in that section, refer to notice of action; to construe them otherwise requires the interpolation of a lot of words, such as, "that the pauper belongs to your district and you are requested to maintain him." Without those words the statute would simply fix the liability of Overseers, and give a right of action against them without notice.

In Burns' Justice it is laid down that it is sufficient to give the names of the Overseers, describing them as Overseers of the Poor, under a statute like ours, where no corporate name is given.

Meagher, Q. C.—When the defendant Overseers refused to receive the pauper upon his removal under a warrant, plaintiff's action, if any, was for damages for not receiving him.

The plaintiffs themselves have proved, by papers they have put in, that there were five Overseers appointed in 1879 in both districts; in 1880, when the action was brought, it is true only three were appointed, but it appears that all the papers and notices on which the action was founded, were prepared and served by and upon the five in both districts in 1879. *4 Best & Smith*, 849.

Tupper.—The authorities cited shew that if too many are appointed their position may be challenged, as by *quo warranto*, but not that their acts are invalid. (McDONALD, J. —The proceedings for removal were confirmed on appeal by a competent court.)

McKenzie, (with *Meagher*).—The proceedings were not confirmed on appeal, but the appeal was quashed, on the ground that it had been taken to the wrong Court.

THE COURT.—We are agreed that the notice was served on the wrong persons, under the point last raised.

Appeal dismissed with costs.

CREIGHTON *v.* LINDSAY.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided February 22nd, 1882.)

Set-off raising question of title.—Decision that the Court was excluded from jurisdiction appealable.

Where a Court has no jurisdiction to try a question of title, defendant cannot oust the jurisdiction to entertain a claim involving no question of title, by pleading a set-off that involves a question of title.

An action was brought in the Magistrates' Court and judgment given for plaintiff. The County Court Judge, on appeal, decided that the question of title was involved, and the Court was therefore "excluded from jurisdiction."

Held, That an appeal lay to the Supreme Court from the decision.

Appeal from County Court for District No. 2. The cause was originally brought in the Justices' Court, before two Magistrates, who gave judgment for plaintiff for $46.83. An appeal was taken to the County Court; where DESBRISAY, J., on hearing read the affidavit of defendant, decided "that title to land is *bona fide* brought in question, and that this Court is therefore excluded from jurisdiction." Plaintiff appealed from this decision on several grounds.

S. A. Chesley, in support of appeal.—The Judge should not have allowed the question of title to be raised except upon the evidence during the trial. When he chose to hear defendants affidavits, he should at least have allowed the other side to come in with affidavits. The affidavit used by defendant was bad, not having the words "before me" in the jurat.

McDONALD, C. J.—It would appear, even from defendants affidavit, that the question of title only arises in connection with the set-off.

RIGBY, J.—The defendant cannot oust the jurisdiction of the Court to try plaintiff's claim by pleading a set-off, in connection with which a question of title may be raised.

The COURT.—There can be no doubt on this point.

McCoy, Q. C., contra.—There is no decision of the Judge on a point of law or fact to be appealed from; *10 C. B.*, 724. The Judge ought to have given judgment of nonsuit.

Chesley not called upon to reply.

Appeal allowed with costs.

JARDINE ET AL. v. ROWLEY ET AL.

Before SMITH, JAMES and WEATHERBE, JJ.

(Argued February 14th, 1882.)

Promissory note signed by defendants as President and Secretary of a company not incorporated at date of note.

In an action brought by indorsees on a promissory note signed by defendants as President and Secretary of a company, the Judge of the County Court found that at the date of the note the company was not incorporated, and rejected evidence offered by plaintiff to shew that at the time of negotiating the note the company was incorporated.

The judgment for plaintiff was appealed from and the appeal dismissed.

Action by indorsees on a promissory note. Defence, that defendants signed as President and Secretary of the Barton Fish Company, an incorporated company, and not individually. The cause was tried before Judge SAVARY, County Court Judge, at Yarmouth, in October, 1883. The Judge found that at the date of the note the company was not incorporated, and gave judgment for plaintiffs. Evidence was offered to shew that at the time of the negotiation of the note the company was incorporated, but this was rejected.

Tupper, (with whom was *Graham*,) in support of rule.—The face of the note shows that the defendants expressly exonerated themselves from liability. Unless the face of the note shews an intention on the part of the parties to make themselves personally liable, they are not so. (WEATHERBE, J. —I venture to say you cannot find that or anything like it.) Cites *Lindes* v. *Melrose*, 3 H. & N., 177. This case is almost identical with ours. (WEATHERBE, J.—It is not in point. SMITH, J.—I have always understood the presumption to be the very reverse. WEATHERBE, J.—I assent to that.) The question is, what did the parties intend. (WEATHERBE, J.—The only question is whether you are not bound by the date

of the note in the hands of an innocent holder. I shall be surprised if you can meet that.) The date is only *prima facie* evidence. (WEATHERBE, J.—Where is there any law for that?) I have authorities. (WEATHERBE, J.—Can you shew any case where it was allowed in the hands of an innocent holder without notice.) I don't know that I can shew anything more than the general principle. Cites *Anderson v. Weston*, 6 Bing. N. C., 296; *Abbott's Trial Evidence*, 802; *Chitty on Bills*, section 626. The company had complied with the requirements of the *Joint Stock Companies Act* on the 5th of February. Up to the 25th of February, it is in evidence, the note had not been given. The plaintiffs took the note as the note of the company, and the fact of the antedating cannot affect that. *Anderson v. Weston* is essentially parallel to this case. The bill there sued on by indorsee bore a date when the defendants were in partnership, but evidence was allowed to be given to shew both the real date of the making and indorsement of the note, and the question of both dates was left to the jury. The evidence shews that the note was indorsed to plaintiffs a month after the incorporation of the company, so that they took it with notice. *Taylor on Evidence*, vol. 1, sec. 169; *Chitty on Pleadings*, vol. 1. The note is that of a company, and the question to be determined by the Court is whether the makers had authority. The parties took the note on its face as it stood. (WEATHERBE, J. —Is there anything clearer this? Here is an indorsee for value before maturity without notice.) The indorsees must recover on the contract entered into when they took the note. They took the note of an incorporated company, existing as such in March. What was their intention? I only ask you to take the time into consideration. (WEATHERBE, J.—We can only consider that in order to ascertain whether the note was taken before maturity, and for no other purpose.) The defendants were acting distinctly as agents of the corporation, and signed as such. They dated the note at a time when there was no corporation, but they only put it into circulation at a time when there was a corporation. Even if we cannot contradict the date, the defendants are not liable in this form of action, but must be sued on the implied warranty that they had authority. *18 Q. B.*, 503; *13 Q. B.*, 744. The company

were sufficiently incorporated for the purposes of the suit on January 17th, when a meeting was held, at which they resolved to be incorporated, and the President, Secretary and Directors were elected. The only thing remaining to be done was the filing of bye-laws. They were then a company *de facto*, if not in the eye of the law. *Abbott's Trial Evidence*, pp. 19, 23. A company holding itself out as such cannot defend when sued and avoid their liability by shewing that they had not complied with all the conditions precedent to their legal existence. A corporation is liable for every act which it ratifies done previous to its legal existence. A company can ratify the acts of its promoters. This company ratified the acts of its President and Secretary by circulating the notes. A commission was admitted, against the objection of the defendants' attorney. The whole commission was not put in. The note referred to in the commission, and to which the evidence relates, was not annexed. The act requires the whole commission to be filed.

Pelton, Q. C., contra.—The consideration for the note in this case was a liability, not of the incorporated company alleged to be the makers, but of other parties. Even if the corporation had power to give notes, they could only give them for their own liabilities in the ordinary course of their own business. The note was really the note of the Barton Fish Trap Company, of which the defendants were members; and there being no plea in abatement here, we are entitled to recover against them. The authority to give that note was given by the Barton Fish Trap Company, not by the incorporated company, and the Judge below has found that. Cities *10 C. B.*, 318. The minutes of the Barton Fish Trap Company, put in by the defendants, shew that the note was delivered to Bond on the 17th January. (*Graham, Q. C.*—It cannot be held, because we put in the minute book to have a particular portion read, that everything the other side finds in the book is our evidence. SMITH, J.—But if you put a book in, without pointing out particular portions you wish read, the whole book is in as your evidence.) This book was put in at the request of defendants' attorney. (*Graham, Q. C.*—The minutes don't shew that; they only

shew that the first page of the minute book was read.) One witness states: "Note dated 17th January, '79; declaration signed the same day and signed first." There is no ground in the rule for appeal under which the defendants can set up their contention as to the form of action. A complete answer, I think, is that the point was not taken at the trial on the motion for nonsuit. The grounds of nonsuit contain no reference whatever to such a contention. Had the point been taken at the trial we would have had an opportunity of amending the declaration by adding a count. (SMITH, J.—The Judge below might have had to decide the point,) *Robertson* v. *Dumaresque*, 2 Moore P. C., N. S., p. 87. (WEATHERBE, J.—That seems to be in point, and if so we are bound by it, but I think there is authority to take on argument a ground formally abandoned below.) *Brown* v. *Bristol and Exeter Railway Company*, 7 H. & N., 706. (JAMES, J.—We have always held that an objection to the evidence must be taken at the trial, but never that an objection to the plea must be taken below.) 7 M. & G., 481; *40 U. C., Q. B.*, 611; *2 Pugsley N. B. Reps.*, 372; *8 Cl. & Fin.*, 245. The form of action is correct. An action may be brought on the warranty where there is a principal in existence who might have ratified the contract, but otherwise where there is no principal. *Pollock on Contracts*, 233; *Kellner* v. *Baxter*, L. R., 2 C. P., 173; *Hueston* v. *Young*, 33 Maine Reps., 85, cited in *Daniel on Negotiable Instruments*, section 73, p. 83; *Daniel on Negotiable Instruments*, section 630, p. 498; *Clark on Bills*, p. 15; *Nichols* v. *Daley*, 9 Exch., 156; *Brice on Ultra Vires*, p. 788. The corporation, if there was one, gave defendants no authority to make this note. *Bramah* v. *Roberts*, 3 Bing. N. C., 963. The company was never a corporation, because the provisions of the *Joint Stock Companies Act* were never complied with. The Act required them not to take the name of any previously existing company. They adopted the name of the preceding partnership. Section 3 of the Act requires the declaration of the corporators to state where the business of the company is to be carried on. The declaration here only states where the meetings of shareholders were to take place. There is evidence that twenty-five per cent. of the capital stock was

not paid up in cash. It was beyond the powers of this corporation to give a promissory note. *Bateman* v. *Midland Railway Company*, L. R., 1 C. P., 499. Section 1 of chapter 54, *Revised Statutes*, provides that no company incorporated under the chapter shall engage in any banking, insurance, or commercial business. This company was incorporated for the purpose of taking, curing and selling fish, which is a commercial business. (JAMES and WEATHERBE, JJ.—They were not a commercial, but rather a manufacturing company.) If not a commercial company, they had no right to make commercial paper. Even if they could make a note, they could only make it for their own liability, while the liability which formed the consideration of this note was not the liability of this corporation, but of the previous partnership. *Steele* v. *Harmer*, 14 M. & W., 831; *Madden* v. *Cox*, 44 U. C., Q. B., 542; *Vol. 4 Sup. Court Canada Reps.*, 644.

Graham, Q. C., in reply.—With regard to the point that if the deposition improperly admitted had been ruled out, there was evidence sufficient to sustain the judgment. (WEATHERBE, J.—Can we hear you on this point after stopping Mr. Pelton upon it? I think not.) I submit that I can be heard on this point, or any point taken in our opening. (WEATHERBE, J.—I am satisfied you have no such right. SMITH, J.—As we are divided, we cannot decide that point.) Then I decline to go on.

The COURT.—We decide to dismiss the appeal.

BLIGH *v.* DARLING.

Before McDONALD, SMITH and WEATHERBE, JJ.

(Decided February 20th, 1883.)

Demand and Refusal in Trover.

THE plaintiff, as assignee in insolvency, brought an action of trover for goods which had been conveyed by one Renwick to defendant, in contemplation of insolvency. The goods had been sold by defendant before action brought.

Held, that evidence was not necessary of a demand and refusal.

This was an action by plaintiff, one of the Official Assignees for the County of Halifax, as assignee, under the *Insolvent*

Act of 1875, of the estate and effects of James R. Renwick, an insolvent. The first count of the plaintiff's writ set out that on and prior to the sixth day of December, A. D. 1878, the said James R. Renwick was a trader, carrying on business in certain premises in the City of Halifax, as a jeweller, and had and possessed a stock of goods, wares and merchandise in his said premises; that the said James R. Renwick, at the time last mentioned, was indebted to the defendant in a large sum of money, as well as to a large number of other persons, and was insolvent, not having sufficient assets to pay all his liabilities, and was on the eve of insolvency, as the defendant well knew, or had reason or probable cause for knowing or believing; that on the day aforesaid the said James R. Renwick, by deed, and in contemplation of insolvency, granted, bargained, sold, assigned, transferred, and set over unto the defendant all the stock in trade, goods, wares and merchandise of him, the said James R. Renwick, situate in his shop and premises in Halifax aforesaid, which said goods are described as follows, &c., &c., whereby the defendant obtained an unjust preference over the other creditors of the said James R. Renwick. The writ also contained counts for forcibly breaking and entering the premises, and taking the goods, and converting them to defendant's own use, whereby the plaintiff was deprived of their use and possession.

At the trial of the cause before WEATHERBE, J., at Halifax, without a jury, the insolvent, Renwick, thus detailed the circumstances which led to the giving of the bill of sale to defendant:—"I was watchmaker and jeweller in 1878; bought, sold, and repaired, and continued in the business till my insolvency, on the 9th December, 1878. I owed defendant about sixteen hundred dollars; J. G. Joseph & Co. about six hundred dollars; Schwab Bros. about three hundred dollars; Bradley & Co. about one hundred dollars; and some small notes amounting to one hundred dollars. The Imperial Bank of Canada held the notes representing J. G. Joseph & Co.'s debt. I owned my stock in trade. I valued it at three thousand dollars, as near as I can tell. There was between three and four hundred dollars of good debts due me. I had given notes to L. F. Darling and Schwab Bros., somewhere about this time. I had not money and was not in a position

to pay Schwab Bros. and Joseph & Co. in full. I was not able in December to pay any of my notes in full as they became due. Defendant's whole claim was represented by notes. I owed defendant for goods and jewellery. All these claims and all my debts mentioned were for jewellery and goods. I purchased nothing from Darling after 9th December. I heard previous to 9th December, and previous to giving bill of sale, about a week or so, of failure of J. G. Joseph & Co., and I went to defendant, because he was my principal creditor, to ask his advice. He knew with whom I had been dealing. I told him the Imperial Bank of Canada had Joseph & Co.'s notes. He knew all of my creditors, but he did not know how much I owed. I told him what I owed Joseph & Co. at the time. I went to him before 9th December. I said Joseph & Co. had promised to carry me through, and now that they had failed, I was afraid they would press me and close me up, and asked his advice. He said he thought I had better give him a bill of sale, and they probably would not press me then, and he would let me have what goods I wanted, and I would probably work through. He said the effect of a bill of sale to him would induce the creditors to give time, as I had written to some of them for that purpose, as I told him. I felt positive that I could work through by preventing these people from coming down on me. I then gave defendant the bill of sale in question which covered almost all my stock in trade, and shop furniture and tools. There was some shop furniture, about fifty dollars, not in this. I could not at this time pay my debts as they became due. If called on to pay the Joseph & Co.'s notes in full I could not pay them."

Subsequent to the giving of the bill of sale, Renwick was arrested at the suit of Schwab Bros., and while he was in jail the goods covered by the bill of sale were taken by defendant, and subsequently sold by him. Renwick valued the goods taken at $1,800, and Bannister, one of defendant's employees, at less than half that amount.

After hearing counsel, the learned Judge found that the bill of sale was given in contemplation of insolvency, and assessed the damages at $900, finding a verdict in favor of plaintiff for that amount. A rule *nisi* was subsequently granted to set the verdict aside, and for a new trial, on the

ground that no demand of the goods and property referred to in plaintiff's declaration was made before action, nor was any other act done to show that plaintiff disaffirmed the contract under which defendant had taken possession of the goods and property in question.

Fielding, in support of the rule.—The action was brought originally for trespass and trover, charging that a certain conveyance under which defendant had possession of certain goods was made in contemplation of bankruptcy. The Judge (WEATHERBE,) found expressly that it was made in contemplation of bankruptcy, and found for the plaintiff. But there was no evidence of any demand and refusal. The bill of sale is dated December 9th, 1878, and the writ of attachment issued in October, 1879. The defendant filed a claim for $1,000, after valuing the goods in the bill of sale. That claim was not contested, and the bill of sale was not disaffirmed by the assignee. (WEATHERBE, J.—They need not object to the claim. It was, in fact, too small. There was a preferential bill of sale to Darling from the insolvent, who remained in possession until shortly before the attachment. While the insolvent was in jail, and before the writ of attachment. Darling seized the goods under the bill of sale, and the assignee then brought this action of trespass and trover, with a special count that the bill of sale was made in contemplation of insolvency.) The form of action has not been followed. The declaration is not a declaration framed under the *Insolvent Act*. (WEATHERBE, J.—All that is alleged in the first count is made out.) The section referring to unjust preferences only gives a remedy to the subject. The action must therefore be replevin. (MCDONALD, J.—Then the object of the Act might be defeated by selling the goods for money. WEATHERBE, J.—It is admitted that there would still be a remedy in equity.) If the subject matter is destroyed, they might perhaps recover in trover, but they would have to prove a demand. (MCDONALD, J.—That would depend upon whether it was and is voidable.) No; even if void, the defendant would have a right to a demand, the assignee not having disaffirmed it. *2 H. Blackstone*, 135. The act is not null and void between the parties, and therefore the defendant is not in

possession wrongfully until there is an assignee appointed. He should therefore have a demand served upon him. (WEATHERBE, J.—It is clear that I found a verdict under the trover count. The damages are assessed.) There is no evidence here that the goods were sold by Darling. (WEATHERBE, J.—I had no doubt that the goods were sold by Darling. It is in evidence that they were sold after the bankruptcy. They could not then have been sold by Renwick, and must have been sold by Darling.) Even admitting that, there should have been a demand. *9 B. & C.*, 764. (MCDONALD, J.—That case does not touch the question. If the defendant had still the property in his possession, possibly a demand would be necessary. But after he had sold it, what need was there of a demand? What necessity is there for a constructive conversion by demand, when you have the actual conversion? WEATHERBE, J.—Darling here had a legal possession, *ab initio*, but it is made illegal by the Act. The argument is that the Act is so sweeping that it vests a right of immediate possession in the assignee.) *13 C. B.*, 285; *L. R., 5 C. P.*, 478. Apart from the statute there is no doubt that there was necessity for a demand. After filing his claim, referring to these goods, and appraising his security under the conveyance of them, the assignee having never disaffirmed the transaction, and no objection having been made, he had a right to assume that no objection was taken to it; and there should, therefore, have been a demand. The conveyance was only voidable by the assignee intervening to set it aside. *2 Ad. & El.*, 94, shews that the word void is sometimes construed as voidable. If these words are to be construed literally, the conveyance is absolutely void, but it is clearly not void as between the parties, and the assignee could have affirmed it, and defendant had a right to presume that he did so. There should have been evidence of some amount on which to found a verdict. (WEATHEBE, J.—There is positiv evidence that the goods cost $1,300, and that Darling got all them except $100 worth. The verdict is for only about $90 That assumes that the verdict could be for all the goods, I I contend that it could only be for those sold, and there is evidence what goods were sold.

Sedgwick, Q.C., contra.—No proof of conversion is necessary under the pleadings in this case. The first count is a perfectly plain count at common law. A common law court is not bound by any particular form of declaration. The mere fact of a declaration being unique is nothing against it, provided it discloses a good cause of action. (WEATHERBE, J.—The matter set out in the first count is *fraud*. That is entirely matter for equity, and the Parliament had no power to make that a common law count.) Cites argument of WEATHERBE, J., in *Lawson* v. *City of Halifax*, 3 R. & C, 168. (WEATHERBE, J. —There it was argued that the plaintiff had an action on the case. That argument went far enough, but yours goes a great deal further.) Eliminating all question of fraudulent preference and contemplation of insolvency, there is a stated charge of conversion by Darling, and that plaintiff was the assignee of the right created by that act of conversion. The plea to that does not deny that conversion. (MCDONALD, J.— There is no evidence of the conversion alleged in the first count.) No evidence was needed. But there is evidence of a conversion before the insolvency. (MCDONALD, J.—There is a plea to the first count, of license, and it is proved. The first count is no count in trover at all. The count in trover is that plaintiff's goods were converted. This is not that plaintiff's goods were converted, but another party's goods.) The idea of license is not proved at all. The year stipulated in the bill of sale had not elapsed. (WEATHERBE, J.—This is a special verdict, with a point reserved.) That point is not taken in the rule. The first count is precisely similar to counts sustained again and again in the Ontario Courts, under the *Insolvent Acts* of 1869 and 1875. The first count is good as it is, because the Dominion Parliament gave a right to the assignee which it had a right to give. It made the conveyance null and void, and if so, the taking of the goods was a tortious taking. (WEATHERBE, J.—What do you ask for under this count?) Damages. (WEATHERBE, J.—For what; for a fraudulent transfer?) The counsel did not ask for a nonsuit on the ground that there was no demand. The ground should be taken on the motion for nonsuit. Unless a counsel, when he moves for a nonsuit, takes all his grounds, he is precluded. (WEATHERBE, J.—That point must have been taken, or I

would not have given a rule. McDONALD, J.—The evidence came out in defence which dispenses with the necessity of that proof.) Demand and refusal are not necessary where the defendant has acted in such a way that he cannot comply with the demand. *10 Metcalf*, 442. This case goes the full length that we require. In this case the case from *2 H. Blackstone* was cited. In none of the cases in the English reports was the conveyance void. They were voidable only by the law of relation. *1 Allen Mass.*, 109; *9 Allen Mass.*, 171. Demand and refusal are only necessary where the impeached transaction is voidable and not void. *Roscoe's N. P.*, 1107. The principle is that when an act of bankruptcy is committed, that act is void, and vests all the property in the creditor for equal distribution. If an arrangement is made afterwards, it relates back to the act of bankruptcy, under the doctrine of relation, which is a common law doctrine. The act here is an act of bankruptcy by section 3, sub-section j, of the *Insolvent Act of 1875*, because it is a transfer of all the insolvent's property, The Dominion Parliament has a right to legislate with regard to procedure in all matters coming within its jurisdiction. *19 U. C. C. P.*, 302. But it is not necessary to argue this. The act simply makes the conveyance null and void, and we have our own procedure to enable us to take advantage of that fact. The clause which enables us to recover back the "subject matter" must be construed liberally. The subject matter means the goods, or the money obtained for them if sold. The only question is whether we have brought ourselves under the terms of the statute. (WEATHERBE, J.—That is not denied. You have brought yourself within the statute, but the question is whether you have done all that is required to enable you to bring an action of trover.) The statute makes the transfer to Darling absolutely null and void, and every act of Darling with reference to those goods was a wrongful act, for which the assignee could bring an action of conversion. Assuming that we must give evidence outside of the mere fact of the taking, we have ample evidence to support trover. The defendant himself acknowledges by his account that he converted the goods into cash.

Fielding, in reply, was directed to confine himself to the last count.—The whole question is, whether the transaction is

void or voidable. (WEATHERBE, J.—Seven Judges in Ontario have decided that a transfer such as this was void, and four Judges here, in *Johns* v. *Barbour*, have decided the same thing. The Ontario Judges held that such transfer did come under those clauses, and was void. And we decided that if the transfer in *Johns* v. *Barbour* had come under those clauses it would have been void.) *McCord* v. *Harper*, 26 U. C. C. P., 96.

MCDONALD, J.—We think the case turns principally upon the second count. It was upon that count that the learned judge founded his verdict, and I have no doubt myself that the moment the assignment was executed it gave certain rights to the assignee, among which was the right to recover that property. The defendant having converted the property by a sale to his own use, I do not see that a demand was necessary at all. It may be where a party holds property under his control, but here, where it is proved that the property was sold, I don't see that any evidence to make out a constructive conversion is necessary. The appeal must be dismissed.

SMITH, J., concurred.

WEATHERBE, J.—If it is admitted that this instrument comes within the 132nd or 133rd section of the *Insolvent Act of 1875*, the verdict must stand. This is the sole question we have to consider, as in *Johns* v. *Barbour* we virtually decided that question, and it is a question that was fully considered.

Rule discharged.

WIGGINS *v.* TOWN OF WINDSOR.

Before McDONALD, SMITH and WEATHERBE, JJ.

(Decided February 21st, 1882.)

Appeal against Assessment.

RULE to quash an assessment of defendant's property discharged with costs where defendant appealed against his assessment, and showed that it was excessive relatively to certain others named. The proper remedy in such case, under the by-laws of the Town of Windsor, is to appeal against the other assessments as too low.

Plaintiff, who was a rate-payer of the Town of Windsor, appealed against the assessment made for the year 1880, and more particularly against the assessment of his real and personal property, to the Court provided for by section 10 of the by-laws of the Town, such Court being composed of three members of the Council, appointed by the Council, and the Recorder, and having power, among other things, after hearing the complaint, and the parties appealing, and the assessors, and any witness adduced on behalf of either of them under oath, "to determine the matter, and either confirm, modify or amend the roll accordingly." The Court, after hearing plaintiff's objections, confirmed the assessment, which was afterwards confirmed by the Town Council. No appeal is provided from the decision of the Appeal Court of the Town, and a writ of *certiorari* was issued from the Supreme Court, under which the proceedings were brought up. Plaintiff then moved on affidavit to quash the assessment on the following grounds:—

1. Because said assessment roll was illegally and improperly made, and not in accordance with the Act incorporating the Town of Windsor, and the by-laws under which the same was made were and are *ultra vires* and illegal.

2. Because the property of said George C. Wiggins, set forth in said roll, is not valued or assessed according to law.

3. Because the valuation and assessment of said property is not made upon a proper principle or basis, nor in proportion to the principle nor basis of valuation adopted in valuing the other property assessed upon said roll.

4. Because there is no fixed basis or principle of valuation of the property of the rate-payers mentioned in said roll, and the assessment is not a fair and equal assessment.

5. Because the property of said George C. Wiggins has been overvalued on said roll, and, compared with the valuation of the property of other rate-payers, is excessive and unjust.

The plaintiff's affidavit, upon which the rule was obtained, shewed that while the real estate of the plaintiff was assessed at an amount nearly approximating its full cash value, the real estate of other persons, a number of whom were mentioned, was assessed at half, or less than half, its actual cash value.

The rule now came up for argument.

Graham, Q. C.—I will contend that this is not a case for a writ of *certiorari*, because the matter complained of did not arise from the exercise of judicial functions. The action of the Town Council in confirming the assessment was not a judicial act. (McDONALD, J.—Should not that point be made the subject of a substantive motion?) No.

Henry, Q. C., in support of rule.—The fact that a judicial decision has resulted in a ministerial act does not prevent the issue of a *certiorari*. We cannot be precluded from *certiorari* by the fact that the assessment roll had passed out of the hands of the assessors and of the Court of Appeal into the hands of the Town Council before we issued the *certiorari*.

During the reading of the affidavits a long argument took place as to the system of assessing low, Graham contending that although the assessment was low, it was consistently so, and no injustice was done.

McDONALD, J.—Point out that the assessor admits that the assessment is low and false.

WEATHERBE, J.—They are to make a "fair and impartial assessment." That differs from the *Revised Statutes*, which requires the assessment to be according to the "actual cash value." These are two entirely different things, and the difference in the language indicates a difference of principle.

Graham, Q. C.—They are attacking the assessment of Wiggins. The quashing of that assessment does not vitiate the assessment of others. We are just dealing with the assessment of Wiggins, and no others.

McDONALD, J.—Is there not an appeal from the assessment of others as too low?

Henry, Q. C.—Yes.

McDONALD, J.—But you did not take that. The Appeal Court could only alter Wiggins' assessment.

Henry, Q. C.—The ground of Wiggins' appeal is that his own assessment was too high.

McDONALD, J.—You should have given notice to them, to avail yourself of that.

Henry, Q. C.—We must assume that notice was given to the parties affected, as being assessed at too low a rate. (WEATHERBE, J.—It does not appear that they had any trial in the Appeal Court.) But we can, nevertheless, contend that Wiggins is assessed too high relatively. (WEATHERBE, J.—Yes, relatively to the great majority, but you only say he is assessed too high relatively to a few other rate-payers selected, which may be extreme cases. *Non constat* that the rest are not assessed in the same ratio as Wiggins. You should have appealed againt the assessment in those special cases referred to as being too low. McDONALD, J.—Can we review the assessment of the others who have never been brought before the Court of Appeal? SMITH, J.—Why should we review their cases, when the statute gives you against them another and a simpler remedy, which you have not used? WEATHERBE, J.—I do not see that the appeal is an estoppel. It is always proper to consider the fact of a right of appeal existing when granting a writ of *certiorari*.) The by-laws are *ultra vires*. Section 37 of the Act gives the Council power to make by-laws for the regulation and mode of assessment. There is no power in the Act to constitute a Court of Appeal.

Graham, Q. C.—The by-laws have been ratified by the act of the legislature.

WEATHERBE, J.—How would that help you, even if *ultra vires?* It is a nullity, and does not affect the roll.

The Court, after some further argument, chiefly as to the question of costs, discharged the rule to quash the assessment, with costs.

OVERSEERS OF THE POOR *v.* McKENZIE.

Before McDONALD, C. J., and JAMES and RIGBY, J.J.

(Decided February 22nd, 1882.)

Surprise.—Judicial Discretion.—Appeal.

THE County Court Judge gave judgment for defendant on appeal from the Magistrates, and afterwards granted a new trial on the ground of surprise and the discovery of new evidence. The only element of surprise consisted of the fact that a witness not examined in the Magistrates' Court had given evidence in the County Court.

Held, That the discretion of the Judge had been unwisely exercised in granting a new trial, and that there was an appeal under section 90 of the County Court Act, 1880.

This cause was originally brought before two Justices of the Peace, who gave judgment for the plaintiffs. An appeal was taken from this judgment to the County Court for District No. 1. Upon trial in the County Court judgment was given for defendant. Plaintiffs then obtained a rule *nisi* for a new trial, on the ground of surprise and the discovery of new evidence. The Judge of the County Court made this rule *nisi* absolute after argument, and the defendant appealed from his judgment.

The judgment appealed from was as follows:—

Application for new trial on ground of surprise and new evidence. The general rule is that a new trial should be granted in cases where a party is taken by surprise by circumstances that could not have been anticipated, but it rests in the sound discretion of the Judge. In this case, acting as a juror, I based my judgment largely on the evidence of the witness Kate Borden, which, if true, showed that the connection between the defendant and Jemima McKenzie could not have taken place on the day and at the time sworn to by her, and if she was mistaken on one point, or swore falsely, she might do so on another. In *Smith* v. *Woodfine*, 1 C. B. N. S., 660, CRESSWELL J. said that if it appeared that a verdict had been obtained by means of perjury, that would be a ground for setting aside the verdict; so if it were shown that evidence was given which had taken the defendant by surprise, and which he could have had no opportunity to meet; and in *Fisher's Digest*, 1875, to constitute surprise a case must have been made at the trial which the opposite party could not

have been reasonably expected to meet. Kate Borden was not examined before the Magistrate, and therefore the plaintiffs had no notice of the evidence, and could not be reasonably supposed to come prepared to meet it; indeed, they were thrown off their guard by the introduction of this new evidence. Again, in *Fisher's Digest*, 1877, "A new trial will not be granted on the ground of the discovery of fresh evidence unless the proposed fresh evidence is such that if brought before a jury a different verdict to that in the former trial would be given." It is not necessary for me to state what the judgment would have been had Kate Borden's evidence not been forthcoming; but I think I may say that in such case there would be a reasonable prospect of a different judgment being arrived at. In the cause of *Seely* v. *Purdy*, decided by the Supreme Court, Thomson's Reports, 414, a new trial was ordered on the ground that the plaintiff was surprised by the defendant's denial on the trial. Upon the whole, I think that I shall exercise a sound discretion by ordering a new trial, and as there is, and will be, contradictory evidence, I order that the trial be had before a jury.

Fielding, for respondent, takes preliminary objection that there is no appeal allowed by the Act, Chap. 2 of the Acts of 1880, sec. 107. Appeals are granted from Magistrates' orders and judgments in bastardy cases, to the County Court, but no further. Appeals in bastardy cases are distinguished in the Act passed in 1881, from ordinary appeals from Magistrates.

J. J. Ritchie, in support of appeal.—The only affidavits on which the rule for a new trial was granted, are affidavits of attorney and counsel, with statements, not sworn, of two or three persons, annexed, which statements one of the parties making the affidavit says he believes can be proved to be true.

The affidavits show no surprise, except that they did not anticipate the judgment given on the evidence taken at the trial.

Fielding, contra.—The question for the Judge below was simply whether the ends of justice would be promoted by granting a new trial. He has exercised his discretion, and this Court should not disturb his decision. Plaintiffs were

surprised at the trial by the evidence of the Borton girl, which had not been given at the trial before the Magistrates.

The COURT.—The Judge here has exercised his discretion unwisely. There is an appeal under the Act of 1880, sec. 99.

Appeal sustained with costs.

TUPPER *v.* CROWE.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided February 24th, 1882.)

Representation as to credit.—Evidence.

IN an action on the case for false representations by defendants of the credit of one Higgins, plaintiff's only evidence as to defendant's knowledge of the position of Higgins consisted of the fact that he had a trust deed from Higgins of all his real estate, and the statement of Higgins that defendant was aware of his position. The goods were purchased on a three months credit, and it was in evidence that at the end of the time Higgins had more than sufficient property to meet the claim. The Court refused, on appeal, to reverse the judgment for defendant.

This was an action on the case tried at Halifax before James W. JOHNSTONE, County Court Judge for District No. 1, in which the plaintiff sought to recover from the defendant damages for fraudulently representing to the plaintiff that William J. Higgins, of Wolfville, in the County of Kings, merchant, was in good circumstances, and might safely be trusted with goods on credit; whereas the said William J. Higgins was not then in good circumstances, and could not then safely be trusted with goods on credit, as the defendant then well knew, and the defendant then, by so representing as aforesaid, induced the plaintiff to sell and deliver to the said William J. Higgins goods on credit to the value of one hundred and fifty-three dollars and fifty-nine cents ($153.59), whereby the plaintiff lost the price of the said goods, and incurred expense in endeavouring to recover the same.

Defendant, in his pleas, denied making the fraudulent representations set out, and for a second plea said that the said plaintiff delivered the said goods to the said William J. Higgins at his own risk and on his own responsibility; that after the alleged delivery of said goods the plaintiff took the

notes of the said William J. Higgins, in full satisfaction of said goods, and dealt solely with the said William J. Higgins, without reference whatever to the defendant.

Plaintiff's evidence in regard to the conversation with defendant was as follows:—"Defendant came to me and asked me if I would let W. J. Higgins have goods; I asked defendant if Higgins was good; he replied that he considered him good, he was doing a cash business; defendant said he had money in Higgins' business himself; defendant, after he had spoken to me about supplying Higgins with goods, handed me this paper; I supplied Higgins after getting this paper; I sold the goods because Crowe told me Higgins was good; I knew nothing to the contrary of what Crowe told me; I did not know anything about Higgins except what Crowe told me; I was induced to give Higgins goods on representation of Crowe that Higgins was good; he said he did a cash business, and had no doubt he would be able to pay for goods in three months; I sold at three months."

The paper referred to was a letter dated Wolfville, May 12th, 1879, addressed to the defendant by W. J. Higgins & Son, in which they said: "We want a small lot of goods only at present, to sell for cash only, and would like if Mr. Tupper would send them at three months, but if he don't wish to sell at so long time, would take a smaller lot. We will send a list that we need now to keep business moving, and he will do as he pleases about sending all or part." A list was added of goods required.

Plaintiff also relied on the fact that at the time of the conversation with defendant, the latter was a party to a trust deed from Higgins and his son, covering their real estate, made to secure certain liabilities, including a debt of $1,000 to the defendant, which was still unpaid.

Higgins, who was called on behalf of the plaintiff, testified that he had told Crowe that the trust deed had destroyed his credit, so that he could not get goods, and that Crowe said he would look round and see if he could get some one to supply him; that at the time of the purchase he was not able to pay for the goods at three months; that he was embarrassed; not

doing a good business, and that Crowe was aware of his position. On cross-examination he said they had $700 or $800 worth of stock on the premises at the time they got Tupper's goods; that the second lot of goods was ordered from Tupper direct, and that at the time of the first renewal of the notes given to Tupper he had property on hand more than enough to pay them.

Defendant's version of the negotiation with plaintiff was as follows:—"I left Wolfville last week in April, 1879; Higgins, I think, told me before I came away to see if I could get a grocer to send him a few staple articles in groceries; in consequence, I went to Tupper and told Tupper; he asked me if I thought Higgins would pay for a small lot in three months; I said I thought he would, and I told him that in the condition in which I left Higgins there was nothing to hinder him doing so; I told him not to send him any goods with expectation of my being liable for them; he replied, 'I don't want you to be liable for anything of the kind;' Tupper then said he would send the goods; I then told him I would not order the goods, but would write to Higgins what he said; I truthfully represented to Tupper Higgins' affairs as far as I knew them; I said nothing to induce Tupper to send the goods; Higgins, up to the time I left, was doing a cash business; I made a *bona fide* statement to Tupper of what I knew; I don't remember telling Tupper I had money in Higgins' business; when the first note to Higgins came due, he had enough in his store to pay the note."

On these facts, judgment was given for defendant, from which plaintiff appealed.

After referring to the evidence, the County Court Judge said:—"The ground of the action is fraud, and I can see nothing in the evidence that implicates the defendant with fraud, or that can sustain the allegation that the representation he made was false, even accepting the statement of the conversation given by plaintiff. When defendant left Wolfville, the last week in April, Higgins had about $1,000 of stock, besides debts considered good to some $800, and a fair business; and defendant's statement that Higgins was doing a cash business is corroborated by Higgins' letter 12th May—

the day before the goods were sent—that he wanted them to sell for cash only. Crowe, the defendant, swears that in the condition in which Higgins was when he spoke to Tupper, he was well able to pay plaintiff, with the assistance he had been and was giving him; and there is nothing in the evidence to shew that defendant came to a wrong conclusion when he said he considered him good, much less to charge him with fraud. The plaintiff's contention at the trial was that the defendant's representations must have been false, because Higgins had given a deed in trust to secure the payment of partnership debts assumed by him on dissolution of partnership of which Crowe had been a member. But that deed was only a conveyance of real estate, and left the stock untrammelled; and in point of fact, of these old liabilities Crowe had himself paid a considerale part, and in proof of the ability of Higgins, it may be instanced that at the time the note for the goods fell due Higgins had property enough to have paid it; but though the representation had been false, the plaintiff failed entirely to shew that at the time the defendant made it he must have known it to be so. This case being novel, and the plaintiff having furnished me with no cases, I have myself consulted several, which establish the proposition I have laid down, and amongst others *2 East*, 92; *3 Taunt.*, 637; *3 Bing.*, 35; *7 A. & E.*, 86; *1 Ex.*, 318; *3 T. R.*, 51, etc., etc.

Ervin, in support of appeal.—Concealment, as well as false statement, when professing to give information, is a ground of action. In *Hutchinson* v. *Bell*, 1 Taunt., 558, the representation consisted in the statement that defendant believed Young had done well and purchased lease of his house. The fact was that Young had purchased the lease of his house, but defendant had lent money towards the purchase, and that Young had also mortgaged the lease. *8 Bingham*, 33; *6 Bingh.*, 401. (The COURT.—We are with you on the law; you need not cite cases.) Defendant concealed the fact that Higgins was involved in and liable to pay debts incurred in a former partnership with defendant, and that Higgins was largely in debt to defendant himself. (RIGBY, J.—It appears that plaintiff's sale was at three months, and that at the end of three months he might have been paid, if he had looked after his money.)

Ervin continues.—All Higgins's real and personal property was encumbered at the time defendant made the representations, and defendant was perfectly aware of that fact. It was to defendant's interest to keep Higgins afloat, until he (Higgins,) was enabled to pay off certain liabilities of the old firm. The letter of defendant to Higgins, in which he tells him he has secured him credit, and says he has told plaintiff Higgins was selling for cash, is an ingenious part of the fraud

(RIGBY, J.—This was peculiarly a case for the Judge below and I am not certain I would not have found the same way JAMES, J.—He saw the manner in which the evidence was given.) Cites *1 T. R.*, 318. It was improper for the Judge to admit evidence of *bona fides* in this case. There was no plea to enable defendant to put in such evidence. His plea only deny the representations. *L. R.*, 7 Ch., Div., 344.

MCDONALD, C. J.—You have made a very clear argument but we think we need not call upon the other side. My own impression is that we would have adopted the same view of the evidence as the Judge below. I do not think the plaintiff's statement was made with intent to defraud the defendant We all think the appeal must be dismissed.

RIGBY, J.—I cannot say that I would have found the same way as the Judge below, but I think the evidence is not so preponderating as to require us to disturb his finding.

JAMES, J.—I might have been greatly perplexed if trying the case, but I do not think the evidence sufficient to compel us to come to the conclusion that there was a fraudulent intent on the part of the plaintiff.

Appeal dismissed with costs.

McGOWAN *v.* HOLDEN.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided February 27th, 1889.)

Charges for intoxicating liquor, not included in account sued for.

In an action on the common counts, the County Court Judge nonsuited the plaintiff on the ground that items for intoxicating liquors in quantities for less than one gallon were, in plaintiff's claim, though not included in the account sued on. Plaintiff, on the appeal, claimed that he should have judgment, having proved his particulars at the trial, but the Court refused it, and granted simply the usual order allowing the appeal.

This was an action on the common counts for goods sold and delivered, tried at Shelburne, before Judge DESBRISAY, County Court Judge for District No. 2. The main ground of defence was that the plaintiff's claim, as set forth, included charges for intoxicating liquors, sold and delivered in quantities less than one gallon, but it appeared that, though the plaintiff had sold liquors to the defendant in quantities less than one gallon, the charges were not included in the account sued on. Defendant moved for a nonsuit, which the Judge allowed, and in delivering judgment His Honor said:—"The omission of these items from the amount sued for, though the plaintiff admits he was not paid, shews an attempt to evade the law, and escape a penalty which the statute, as I think, plainly enforces. Had these items appeared in the account, no further proof would, under the enlarged terms of the statute, have been required to destroy the plaintiff's claim, and he is not to be permitted to secure that claim by a mere omission of the items, they having been made, as shewn by his books, in his general running account with the defendant." The plaintiff was permitted to take a rule allowing an appeal to the Supreme Court.

Tupper, in support of rule, was stopped, and

J. J. Ritchie, contra, called upon.—The amended particulars shew that all the liquors were sold in quantities less than ten gallons. Under section 3 of the statute the plaintiff cannot recover in regard to the liquors sold in quantities less than one gallon, and it appears, on the face of the account, that the items for which the plaintiff could recover were paid for by

the credits given, which must be applied to the payment of the legal debt.

Tupper.—We have a right to a rule for judgment for plaintiff, as our particulars are proved. Defendants have rested on their motion for nonsuit, and are bound by it.

The COURT.—We will give you simply the usual order allowing the appeal with costs.

STAYNER ET AL. *v.* HOWATT.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided March 8th, 1882.)

Indorsee against drawer for non acceptance.—Demurrer, for want of notice overruled.

PLAINTIFFS, as indorsees, sued defendant as drawer of a foreign bill, alledging that the bill was duly presented for acceptance and dishonored, and defendant had not any effects in the hands of the drawees, nor any reasonable ground for expecting that he would have, or that the bill would be honored, and that defendant had sustained no damage by reason of having no notice of the non-acceptance. Defendant demurred, on the ground that plaintiff was bound to give notice to defendant of non-acceptance, or hold the bill till due, and again present it for payment before sueing, and to allege accordingly. Demurrer overruled.

Plaintiffs, as indorsees, having sued defendant as drawer of a bill of exchange, obtained leave to amend their declaration by adding two counts thereto, the second being in the words following:—And for that the defendant, on the twenty-fourth day of November, A. D. 1875, at Crapaud, in the Province of Prince Edward Island, by his foreign bills of exchange, now overdue, directed to Messrs. S. Mutch and Company, Halifax, required the said S. Mutch and Company to pay to Captain Josiah Slaughenwhite, or order, twenty days after sight, one hundred and thirty-two dollars, and the said Josiah Slaughenwhite endorsed the said bill to the plaintiffs, and the said bill was duly presented for acceptance, and was dishonored, and at the time when the said bill was drawn, and from thence and until and at the end of the day when the said bill was presented for acceptance, as aforesaid, and until the end of the day when the said bill was dishonored, as aforesaid, the defendant had no effects in the hands of the said S. Mutch and Company, nor had the defendant ever any reasonable ground for expecting that the said S. Mutch and Company had,

or could have any such effects, or that the said bill would be accepted upon presentment for acceptance, nor hath the defendant sustained any damage by reason of his not having had notice of the said presentment for acceptance of the said bill, and the dishonor thereof, and the defendant hath not paid the same.

To this count the defendant demurred, on the following grounds:—

1. Because the said plaintiffs, in the said second added or amended count, say that the defendant, on the twenty-fourth day of November, A. D. 1875, at Crapaud, in the Province of Prince Edward Island, by his foreign bills of exchange, now overdue, directed to Messieurs S. Mutch and Company, Halifax, required the said S. Mutch and Company to pay to Captain Josiah Slaughenwhite, or order, twenty days after sight, one hundred and thirty-two dollars, and the said Josiah Slaughenwhite endorsed the said bill to the plaintiffs, and the said bill was duly presented for acceptance, and was dishonored, and that at the time when the said bill was presented for acceptance, as aforesaid, and until the end of the day when the said bill was dishonored, as aforesaid, the defendant had no effects in the hands of the said S. Mutch and Company, nor had the defendant ever any reasonable grounds for expecting that the said S. Mutch and Company had or could have any such effects, or that the said bill would be accepted upon presentment for acceptance, nor hath the defendant sustained any damage by reason of his not having had notice of the said presentment for acceptance of the said bill or the dishonor thereof, and that the defendant hath not paid the same, without also stating that the defendant had due notice of the said presentment for acceptance and dishonor of the said bill, and because under the facts set forth in the said second added count the defendant was not liable on the said bill for the same being duly presented for acceptance and dishonored without his having had due notice thereof.

2. And also, because the said plaintiffs, in the said second added or amended count, say that the defendant, on the said [illegible] of November, A. D. 1875, at Crapaud, in the Prince Edward Island, by his foreign bill of overdue, directed to Messieurs S. Mutch and

Company, Halifax, required the said S. Mutch and Company to pay Captain Josiah Slaughenwhite, or order, twenty days after sight, one hundred and thirty-two dollars, and the said Josiah Slaughenwhite endorsed the said bill to the plaintiffs, and the said bill was duly presented for acceptance, and was dishonored, and that at the time when the said bill was drawn, and from thence and until and at the end of the day when the said bill was presented for acceptance, as aforesaid, and until the end of the day when the said bill was dishonored, as aforesaid, the defendant had no effects in the hands of the said S. Mutch and Company, nor had the defendant ever any reasonable ground for expecting that the said S. Mutch and Company had or could have any such effects, or that the said bill would be accepted upon presentment for acceptance, nor hath the defendant sustained any damage by reason of his not having had notice of the said presentment for acceptance of the said bill or the dishonor thereof, and that the defendant hath not paid the same, without also stating that the said bill was duly presented for payment, and was dishonored, and that at the time when the said bill was drawn, and from thence until and at the end of the day when the said bill became due and payable, and was so presented, the defendant had no effects in the hands of the said S. Mutch and Company, nor had the defendant ever any reasonable grounds for expecting that the said S. Mutch and Company had or could have any such effects, or that the said bill would be paid upon presentment for payment, nor hath the defendant sustained any damage by reason of his not having had notice of the said presentment and dishonor of the said bill; and because the facts set forth in the said second added count did not operate to excuse notice to the said defendant of the said alleged presentment for acceptance and dishonor, and the said second added count is insufficient in law.

The demurrer now came on for argument.

E D. King, in support of demurrer.—The plaintiffs were obliged either to give notice to the defendant, the drawer, of non-acceptance, or else to hold the bill till due, and present it again for payment, before he could sue. The drawer had the whole time till the bill was due to place funds in the drawee's

hands. For counts excusing want of notice see *Chitty on Pleadings*, p. 59; *Bullen & Leake*, (3rd Ed.) 99; *Blackhan* v. *Doran*, 2 Campb., 503; *Hammond* v. *Dufiene*, 3 Camp., 145. (RIGBY, J.—If there is no acceptance there is no day for payment of this bill, which is made payable twenty days after sight.) The presentment for acceptance is the "sight," and fixes the time of payment coming due. (RIGBY, J.—But Chitty says, citing authority, that "sight" and "after sight" mean "acceptance" and "after acceptance.") See *Rucker* v. *Hiller*, 16 East, 43. For aught we know the drawee would have accepted the bill next day. The general principle is that, if the defendant can be damnified, he should have notice. The Courts are becoming more careful about dispensing with notice. *Foster* v. *Parker*, L. R., 2 C. P. Div., 18. The burden of proof is on plaintiffs that we had no expectation of funds in drawee's hands.

J. G. Foster, contra, not called upon. Demurrer overruled.

THE QUEEN v. HAWES ET AL.

Before McDONALD, SMITH and WEATHERBE, JJ.

(Decided March 7th, 1883.)

Suit by the Crown.—Second Plea without Leave.—Entering Judgment on Default without Assessment.—Default.—Execution.

IN an action on a bond for $400, at the suit of the Crown against the principal and one of the sureties, the defendants pleaded more than one plea without leave, and the plaintiff's attorney, treating the plea as a nullity, on the ground that the Crown was not bound by section 178 of the *Practice Act*, (allowing a second or subsequent plea,) marked default, and without filing any record, entered judgment without any assessment of damages, upon which execution was issued, endorsed to levy for a sum less than eighty dollars.

Held, on appeal from the County Court, that the judgment was properly set aside by the County Court Judge.*

This was an appeal from a decision of the Judge of the County Court for District No. 1, in an action by Her Majesty the Queen against George Hawes and two others, as principal and sureties upon a certain bond, wherein Hawes, as principal, and his co-defendants, as sureties, became bound to the Crown

* The Court did not touch the question as to the default, or the question as to the validity of the execution, even assuming the judgment to be good; as to which see the judgment of the learned Judge of the County Court, p. 271.

in the sum of four hundred dollars, conditioned upon the faithful discharge by Hawes of the duties of the office of Deputy Inspector of Pickled Fish. The action was for the penalty provided in the bond, the breach alleged being the branding by the Deputy Inspector of certain brands of mackerel as of a better quality and larger quantity than the same really were.

Two of the defendants, the principal and one of his sureties, appeared by attorney, and pleaded to several pleas, and served demands for further and better particulars, but the attorney of the Crown, being of the opinion that the pleas pleaded were a nullity, on the 8th July, 1879, marked a default in the regular way, and informed the defendants' attorneys of the course he had adopted. On January 15th, 1880, judgment was entered up on the default so marked, and execution was issued thereon, without the filing of a record, on the 5th of February following. On the 23rd of February, 1880, a rule *nisi* was obtained to set aside the judgment and execution on the following grounds :—

1. Because there is no record.

2. Because the execution is not in the form required in Crown cases, and issued without proper record.

3. Because the judgment was entered after appearance and plea filed and served, and without trial or assessment of damages.

4. Because there was no regular default on which to enter judgment.

5. Because the judgment is not signed by the proper officer, and the record is not signed by any proper person or officer of the Court.

6. Because of irregularities in the writ of summons, no particulars having been given.

The rule was subsequently made absolute by the Judge of the County Court, who gave judgment as follows :—

Application to set aside judgment and execution, on four grounds.

1. No record filed. The 266th section of the *Practice Act* provides that no execution shall issue on any judgment until the bill of costs and record shall have been filed. This is not a summary suit, as alleged by Mr. Tupper. The fact that he chose to endorse an execution to levy for a sum under

$80 cannot avail to change the nature of the action, and there was no regular record roll filed. If Mr. Tupper's contention is correct, and he was justified in treating the pleas as a nullity, then the record should have stated a judgment by default; but the want of a record is an objection that would go to the execution, but would not affect the judgment.

The second objection is that the execution is irregular, not being such as is required in Crown cases, and it was alleged that an extent was the proper instrument. That the practice is that which has obtained in this Province in like cases was not shewn, nor was it made to appear in what respects the execution issued differed from an extent. By an extent the Sheriff is commanded to take the body of the defendant, and also to seize his goods and chattels, lands and tenements. This is nearly the form of an execution. The subsequent proceedings of appraisement and inquisition differ from all subsequent proceedings under execution, but with them we have nothing to do.

The third objection is that the judgment was entered up after pleas filed and served, without trial or assessment of damages. Mr. Tupper contends that he had a right to treat the pleas as a nullity, because several pleas were pleaded without leave. Our *Practice Act* is very explicit,—section 178, that no leave shall be required to plead several pleas; or and section 138 provides that the plea that the deed is not his deed shall only put in issue the execution of the deed, and that all other defences must be specially pleaded. The rule of construction of statutes is that the Queen is not included unless there are words to that effect, for it is implied that the law made by the Crown, by and with the assent of the Lords and Commons, is made for subjects, and not the Queen. But still I think it exceedingly doubtful whether the old rule that more than one plea cannot be pleaded without leave obtained applies to actions like this on a bond for the breach of a duty. But if leave be required it could only be obtained from the Attorney-General, and could not be granted by the Court or a Judge. And in any event I am of opinion that it could only apply to cases commenced by the Attorney-General, where his name appears as prosecuting. I think that Mr. Tupper, the attorney on the record, was not justified in treating the pleas

pleaded as a nullity. The *Practice Act*, section 86, cited as permitting the party to sign judgment where second pleas are pleaded without leave, has no application.

I am also of opinion that under no circumstances would the issue of an execution on a judgment be warranted until damages on the breaches had been assessed. For these reasons I make the rule absolute to set aside the judgment and execution.

From this decision the Crown appealed.

Graham, Q. C., in support of appeal, cites *1 Ch. Arch.*, 279–278; *Queen* v. *Fraser*, 2 R. & C., 231. Where a defendant pleads pleas which are double or inconsistent in the case of the Crown, the proper course is to treat the pleas as a nullity, and to mark a default. The Judge had no right to set aside the judgment, because it was regular, and merits were not sworn to. The defendants were guilty of *laches*. Notice of the marking of the default was given on the 18th of July, 1879, the day it was entered, and no motion was made in Court to set the default aside until 23rd February, 1880.

McDonald, contra.—I am not attacking the default. We never moved to set it aside. What we wish to do is to set aside the final judgment. The Judge was not asked in the rule to set aside the default. If the action sounds in damages, an inquiry is necessary, whether there are particulars or not. Where the action is for a debt, judgment cannot be entered without an inquiry, unless particulars are given. (WEATHERBE, J. —The Queen only gets this writ and declaration together by taking advantage of the statute.) Yes, and when she takes advantage of a statute, she is bound by its provisions.

Graham, Q. C., in reply.—I submit that there is no difference between the default and the judgment. If this appeal is dismissed, the Court below will follow the matter up by setting aside the default. (WEATHERBE, J.—We cannot help that.) The delay of defendants in making the application, some eighteen days after judgment, should have prevented their getting a rule. (WEATHERBE, J.—But the defendants were at Spry Harbor.) If the Court is ready to dismiss the appeal, it should be with a rule allowing the judgment to be set aside, and directing the default to be sustained.

The COURT.—We hold that the judgment was properly set aside. We have nothing to do with the default, which was not touched in the judgment of the Court below.

EATON *v.* ROUE.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided March 16th, 1882.)

Rule to refer, upheld.

DEFENDANT appealed from an order referring a cause to arbitration at the instance of plaintiff, on the ground that there was a plea of negligence in the conduct of the services for which the action was brought; but it was not shown that the defence would really be raised. It was also argued that the Judge had no jurisdiction to refer the cause to arbitration after a demand made for trial by jury, but this ground was not taken in the rule for appeal.

The appeal was dismissed.

This was an appeal from an order absolute made by his Lordship the Chief Justice, at Chambers, referring all matters in dispute in the cause between the parties thereto to arbitration. The action was to recover an amount claimed by plaintiff to be due him for personal services as attorney, performed for defendant, the services in question covering a period of several years, and the order *nisi* was applied for and obtained on the last day for pleading, and before plea pleaded. Defendant resisted the order of reference, on the grounds set out in the following affidavit:—I, William Roue, of the City and County of Halifax, Billiard Saloon Keeper, make oath and says as follows, that is to say:—

1st. That I am the defendant herein, and I have a good defence to this action on the merits, as I am advised by counsel, and do verily believe.

2nd. That I have pleaded to the above action the pleas now on file, to which I crave leave to refer.

3rd. That the above action is brought for professional services, claimed to have been rendered by the plaintiff, and the chief part of his claim is for attorney's costs, and money alleged to have been paid in an action, to which claim I have, amongst other things, pleaded negligence and unskilfulness on the part of the plaintiff, and I am informed and advised and

believe this is a proper issue to be tried by a jury. That I have by my attorney demanded that the issues raised herein be tried by a jury, and I desire them so tried. After deducting this claim from plaintiff's particulars, he cannot show any other demand within the jurisdiction of this Court that has not been discharged by payment, and I am advised and do believe that this is not a case that should be disposed of before an arbitrator, because questions of law will arise that should be argued on a trial, and I say that the matters in dispute in the above action do not consist wholly or in part of mere matters of account which cannot be conveniently tried in the ordinary way, and the plaintiff's statement to that effect is incorrect.

The rule for appeal was on the following grounds :—

1st. The facts stated in plaintiff's affidavit are contradicted by defendant's affidavit.

2nd. Because negligence is a defence to an action for attorney's work, and whether there was negligence is a question for a jury to determine.

3rd. Because the application for the order *nisi* was made before issue joined.

4th. Because there was no question of account to be submitted to arbitration.

Fielding, in support of appeal.—The statement in plaintiff's affidavit that "the matters in dispute in this action consist wholly of matters of mere account" is distinctly denied in defendant's affidavit. This is sufficient, according to decisions of this Court, to prevent a reference. The special plea of negligence and unskilfulness raises a defence which is peculiarly for the jury. Cites *7 Bing.*, 569, quoted in *Ch. Arch. Pr.*, 96. (RIGBY, J.—Your plea comes within that case in *Bingham*, but your affidavit does not allege any fact to show that the issue of negligence will really be raised.) *6 Ad. & El.*, 337. All we need have done was to produce the plea. Under chapter 4 of the *Acts of 1878*, sections 2 and 4, a demand having been made for trial by jury, there was no jurisdiction in the Judge to make an order referring the cause.

The COURT.—That ground is not taken among your grounds of appeal.

McDONALD, C. J.—It was not taken before me.

Ritchie, Q. C., contra, not called upon. (Volunteers citation of *Reese* v. *Chaffers*, Fisher's Dig., 196; also *L. R., 2 C. P.*, 406.)

Appeal dismissed with costs.

McLEAN *v.* GARNIER.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided March 16th, 1882.)

Notice of dishonor by telegraph, proof.

A JUDGMENT was given for defendant in an action by indorser against indorsee, there being no proof of the contents of a notice said to have been sent by telegraph or of the telegram having been received.

Judgment sustained.

This was a rule to set aside a judgment for defendant in an action brought by indorsee against indorser of a promissory note. The principal defence was want of notice of dishonor, the alleged notice having been sent by telegraph. The cause was tried at Halifax, in November, 1881, before McDONALD, C.J., without a jury, who found a verdict for defendant on the ground of insufficiency of the notice of dishonor.

J. N. Ritchie, Q. C., in support of rule.—The evidence shews that the only mail communication with the place where defendant resided was monthly, and that the usual course of business was to send communications by telegraph. The same principles which apply to transmission of notice of dishonor by mail will apply to the transmission of notice by telegraph. We were not obliged to give notice to produce the notice of dishonor. We could give any kind of secondary evidence. Cites *Daniell's Neg. Inst.*, section 1004.

The COURT.—We think we need not call on the Attorney-General. There is no evidence of the telegram being received by the party, or of the contents of any telegram actually transmitted.

Rule discharged with costs.

POPHAM *v.* CAHOON.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(*Decided March 18th, 1882.*)

Policy of Insurance attached under garnishee order.

A GARNISHEE order was made April 7th, at the instance of plaintiff, attaching an amount alleged to be payable to defendant under a policy of insurance. On application by the agent of the Company for delay, on the ground that the loss was not admitted and that he wished to get instructions from his Company, an order was made that the garnishee should not be required to pay the money until the further order of the Court, and that, in the meantime, the debt should remain attached. On 11th October, the Company having in the meantime admitted the debt and paid it over to the assignee of the claimant, the Judge made an order *nisi* for the payment of the money to the judgment creditor, which he afterwards made absolute, holding that the garnishee, after assenting to the order of April 23rd, was estopped until that order was rescinded from raising the question that a policy of insurance could not be garnished, and that the proof of loss having been satisfactorily made, the amount became attachable as an existing and acknowledged debt which the garnishee had paid over to the assignee at his peril.

Held, that the policy was not attachable under the garnishee order issued in April, and that nothing had afterwards occurred to alter the legal relations of the parties.

This was an appeal from the County Court for District No. 1.

On the 7th April, 1881, plaintiff, who was a judgment creditor of the defendant, Cahoon, applied for and obtained an order *nisi* garnisheeing "all debts due and owing, or accruing due" from the Sovereign Fire Insurance Company to the defendant. The following was the affidavit upon which the order was obtained:—

JAMES POPHAM, Plaintiff.

vs.

SOLOMON CAHOON, Defendant.

I, Thomas Ritchie, of the City and County of Halifax, attorney-at-law, attorney and agent of the above-named plaintiff, make oath and say as follows:

1. That on the 22nd day of February, A. D. 1881, the above-named plaintiff recovered a judgment of this Honorable Court against the above-named defendant for the sum of four hundred and ten dollars and ninety cents debt and costs of suit.

2. That the whole of said judgment is still wholly unsatisfied, no payment having been made thereon.

3. That the Sovereign Fire Insurance Company of Toronto is indebted to the defendant in a large sum of money, as I am informed, and do verily believe.

4. That the said Sovereign Fire Insurance Company, of Toronto, aforesaid, is a company incorporated out of this Province, having assets and doing business in the City of Halifax, by Isaac Wylde, their agent, and are within the jurisdiction of this Court.

On the 23rd April an application was made to the Court by the agent of the company for delay, for the purpose of enabling him to obtain instructions from his principals as to any further proceedings, and an order was accordingly made in the following terms, to which the attorney of the Company assented:—

On hearing read the garnishee order made herein on the seventh day of April, instant, and on argument, I do order that the said garnishee shall not be required to pay the judgment creditor the said judgment debt, until a further order of the Court or a Judge is made herein, the debts due or accruing due to remain in the meantime attached under said garnishee order.

Halifax, this 23rd day of April, 1881.

(Sgd,) J. W. JOHNSTON.

On the 11th October the plaintiff again applied to the Court, on the following affidavit, and obtained an order *nisi* for the payment of the debt due him from the judgment debtor out of the property attached under the previous order:

HALIFAX, SS.

In the County Court, District No. 1.

JAMES POPHAM, Judgment Creditor.

vs.

SOLOMON CAHOON, Judgment Debtor.

and

THE SOVEREIGN FIRE INSURANCE COMPANY, OF TORONTO, Garnishee.

I, Thomas Ritchie, of the City and County of Halifax, attorney-at-law, the attorney of James Popham, the judgment creditor herein, make oath and say as follows:

a garnishee order was granted herein on the seventh
pril last past, which said order is on file in this
at on the twenty-third day of April last past,
n was made to this Court to have said order made
(the motion having been postponed in the meantime
quest of Messrs. Henry & Weston, the attorneys of
reign Fire Insurance Company, of Toronto, the
herein.)

on the twenty-third day of April last, when the
as made to have said order made absolute, one of
bers of said firm of Henry & Weston was present,
f of said Sovereign Fire Insurance Company, of
and then stated that he did not oppose the said
ng made absolute, so far as attaching any funds or
or accruing from the garnishee to the said Solomon
provided that the money was not to be payable until
of loss furnished the company was deemed satis-
and that as soon as said proof was accepted as
ry, and the amount payable under the policy adjusted,
to apply to this Court for an order for the payment
ount due on the judgment of the said James Popham
ne said Solomon Cahoon, attached under said order,
cordance with said arrangement, the said order of the
pril last was taken.

I subsequently enquired at the office of the agent of
eign Fire Insurance Company, at Halifax, to ascertain
e money would be paid; he informed me that the
would pay the loss, but that the money had not
down yet.

some time after the issue of the garnishee process
e said Solomon Cahoon assigned all his property to
t, of the City of Halifax, merchant.

in the course of the month of September last, I again
quiries to ascertain if said loss had been paid by the
Insurance Company, and was then informed that
done so, and that they had paid over the whole
o the said Levi Hart, the assignee of the said Solomon
ne having given the company a bond, indemnifying
n all claims against said insurance money.

That the amount paid by said Sovereign Fire Insurance Company, on settlement of the loss on the stock insured by said Solomon Cahoon, far exceeded the amount attached under the garnishee process herein, as I am informed and believe.

Lastly, I say that previously to the issue of the garnishee process herein, the agent of the said company at Halifax informed me that the said company had insurance on the stock of the said Solomon Cahoon, that said property had been lost by fire, and that the loss was payable to said Solomon Cahoon.

(Sgd.) THOMAS RITCHIE.

Sworn to at Halifax, in the County of Halifax, this 11th day of October, A. D., 1881, before me,

THOS. F. O'BRIEN,
Commissioner Supreme Court, County of Halifax.

The learned County Court Judge pronounced the following decision :—

On 7th April last I gave a rule *nisi* to garnishee the debts due and owing or accruing due the judgment debtor in the hands of the Sovereign Insurance Company. When the rule was moved to be made absolute, I was of opinion that the debt was not in position to be garnisheed, being little more than a chose in action, whereupon I suggested the terms of an order to meet the case, to which the then attorney of the garnishee assented, and the order of the 23rd April was made, by which the debt was to remain attached, though the garnishee was not to be required to pay the judgment creditor the amount of the judgment debt until further order of the Court or a Judge was made. On the 11th day of last October, on the application of the judgment creditor, supported by affidavit, I made an order *nisi* for the payment of the judgment debt out of the moneys attached. The making this order absolute was opposed by Mr. Graham, on behalf of the garnishee, on the ground that there was no specific allegation of indebtedness of the Sovereign Insurance Company to the judgment debtor, Cahoon, and that the claim on a policy of insurance cannot be garnisheed; but I am of opinion that after the assent of the garnishees to the order of the 23rd

April they are estopped from raising this question in the present stage, and without said order being rescinded, and also that the proof of loss having been made satisfactory to the insurance company, which was the only ground on which they resisted payment, and they having paid over the money, as stated in Mr. Thomas Ritchie's affidavit of the 11th of October, 1881, it became a debt attachable under the garnishee process as an existing debt due and acknowledged from the garnishees to the judgment debtor, and which debt the garnishees paid over at their peril in the face of the orders of the 7th and 23rd April outstanding, and unrescinded. I shall therefore make absolute the order *nisi* of the 11th October.

From this order the garnishee appealed, on the following grounds:—

1. The said order of the 27th October, 1881, was contrary to law, and the Judge had no power under the statute to make such an order.

2. That the proceeds of a policy of insurance, or the amount of a policy of insurance is not a debt, and is not garnishable or attachable under the statute.

3. That there is no sufficient evidence of the existence of a debt.

4. That the Judge had no jurisdiction or power to make the order of 23rd April, 1881, and the same was improperly read at the argument.

5. Because the affidavits on which the order of 27th October, 1881, was made absolute were insufficient.

The appeal came on for argument March 15th, 1882.

Graham, Q. C., in support of appeal.—A claim under a policy is not attachable, and cannot be made the subject of a garnishee order, even after a verdict against the company. The Sovereign Fire Insurance Company is a foreign company, doing business within the Province, and our statute, chapter 94 *Revised Statutes*, section 283, requires the garnishee to be a party within the jurisdiction. The claim against the company was not attachable when the first garnishee order was made,

and had been paid over when the second was made. On the first point cites *Boyd* v. *Haynes*, 5 U. C. Pr. Rep., 15; *Fraser* v. *McCaffrey*, 3 R. & C., 498; *Jones* v. *Thomson*, El. Bl. & El., 63; *Dresser* v. *Johns*, 6 C. B. N. S., 429. On the second point cites *Raunie* v. *Morrow*, 3 Pugsley's Rep., 270. The statutes in New Brunswick, both as to garnishee process and foreign companies, are similar to ours. *Lundy* v. *Dickson*, 6 U. C. L. J., 692. The affidavits of plaintiff are insufficient, containing no sufficient allegation of a debt from garnishee to judgment debtor. The Judge has found that when the order to attach the debt was made in April, there was no debt to be garnisheed. Before the final order absolute was made in October, the judgment debtor's claim under the policy had been paid over to one Hart, under an assignment from the judgment debtor, for the benefit of his creditors. Plaintiff's remedy then, if any, was by attachment against the garnishee company for contempt in disobeying the first order.

George Ritchie, contra.—The admission of the attorney of the company ought to be held sufficient proof of debt when the order of 23rd April was made. Cites *Knox* v. *Conn. Ins. Co.*, 25 American Decisions, 33, where a claim against an insurance company was held to be attachable; cites also *20 American Rep.*, 128. The admission of the attorney was confirmed by the agent of the company. We admit there is no English case against those cited by the other side on the point whether a claim under policy is attachable. In *8 Irish Exch.*, 261, cited in *Fisher's Dig.*, 370, it was held that the possibility of a defence being set up to an action for a debt did not prevent its being attachable. Ought not the application in this cause to have been made to set aside the first order, of April 7th, for attachment?

Tupper, in reply.—As to the necessity for the affidavit being explicit as to the existence of a debt, cites *7 D. & R.*, 272; *1 Ch. R.*, 58; *1 B. & P.*, 1; *3 U. C. L. J.*, 27.

McDONALD, C. J., now (March 18th, 1882.) delivered the judgment of the Court:—

In this case we think the appeal must be allowed, with costs. We agree with the learned Judge below that the claim

against the insurance company was not attachable when the garnishee order issued, and we think that nothing occurred before the money was paid over to Hart that altered the legal relations of the parties.

ELLIOTT *v.* McDONALD.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided March 18th, 1882.)

Rule Returnable on Circuit.

A JUDGE at Chambers has no power to make a rule *nisi* returnable before the Court on circuit.

Defendant having been convicted, under chapter 75 of the *Revised Statutes*, "Of Licenses for the Sale of Intoxicating Liquors," of selling liquor without license, and a fine imposed, a writ of *certiorari* was issued, under which the proceedings, summons and conviction were removed to the Supreme Court. On the 18th October, 1882, plaintiff, who was Clerk of License for the Town of Pictou, obtained from Mr. Justice JAMES a rule *nisi* to quash the writ of *certiorari* on certain grounds therein stated, which rule was made returnable "before the Supreme Court, at Pictou, on the last day of the October Term of said Court, at Pictou." Subsequently, on the 24th October, at Pictou, the rule *nisi* so taken was enlarged until the first day of the next December Term, and made returnable before the full Court at Halifax.

The rule came up for argument March 14th, 1882.

Attorney-General took a preliminary objection that the Judge at Chambers had no jurisdiction to grant a rule *nisi* returnable before the Court on circuit. Section 26 of chapter 13 of the Acts of 1883, which gives a Judge at Chambers power to make a rule *nisi* returnable before the Court, does not apply to the Court on circuit, but limits its application to the Court *in banco*.

Ritchie, Q. C., contra.—The practice of the Bar has always been to take out such rules, and we should, under the circumstances, be relieved of costs.

McDONALD, C. J., now, (March 18th, 1882,) delivered the judgment of the Court :—

We think the objection of the Attorney-General must prevail that the Judge had no power to grant a rule *nisi*, returnable otherwise than before the Court *in banco*. The rule *nisi* of Mr. Justice JAMES to quash the *certiorari* will therefore be discharged with costs.

HUESTIS *v.* LYONS.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided March 18th, 1882.)

Rule, on Discharging Appeal, to Enter Judgment in Court below.—Irregularity.

THE Court dismissed an appeal, for irregularity in the form of the rule, and granted a rule directing the Clerk of the County Court to enter up judgment in the County Court for the plaintiff. On appeal from a decision discharging a rule *nisi* to set the judgment aside,

Held, that the order of this Court for entering up judgment was in excess of jurisdiction, and the Clerk of the County Court had no authority to enter up judgment.

This was an appeal from the County Court for District No. 4. The appellant had been convicted of a violation of the statute respecting licenses for the sale of intoxicating liquors, had appealed to the County Court, which sustained the conviction, and had subsequently appealed to the Supreme Court, where the appeal was quashed for irregularity, having been taken in the form of a rule *nisi* granted by the County Court, returnable before the Supreme Court. The respondent took out a rule in the Supreme Court discharging the rule *nisi*, and directing the Clerk of the County Court to enter up judgment in the County Court for the sum of $86.90 and the certified costs of appeal. Judgment was entered up and signed by the Clerk of the County Court, at Truro. A rule *nisi* was granted by the County Court to set aside the judgment, which rule *nisi* was discharged upon argument, and an appeal taken to the Supreme Court.

Tupper, in support of appeal.—The judgment entered below in this case should have been a conviction in the form prescribed by the statute. There is no authority for the Clerk

of the County Court signing this judgment. Cites chapter 74 *Revised Statutes*, section 23; *Huestis* v. *Lyons*, 1 R. & G., 249; chapter 94 *Revised Statutes*, 235.

J. J. Ritchie, contra.—The defendant has moved in the wrong Court. He should have moved in this Court to set aside the rule granted. (McDONALD, C. J.—I think the course would have been to bring the matter here by *certiorari*.) Perhaps so. The only jurisdiction the Court below has is statutable, and the statute gives no power to the County Court to review a judgment ordered by this Court. Every intendment was to be made in favor of the rule granted by this Court. (McDONALD, C. J.—But no intendment is to be understood in favor of any order against express law. The Clerk of the County Court could have refused to obey it.) The order of this Court at most was irregular; it was not a void order, merely voidable. The Court had jurisdiction over the subject matter. The grounds taken in the rule *nisi* below to set aside the judgment are insufficient to cover the argument made here. They do not give notice of the mode in which the judgment was to be attacked. They should have shewn how "the order directing the entry of said judgment by the Clerk of this Court is irregular and void." The only irregularity in this case was in the rule to enter this judgment; the proper course, therefore, was to attack first the rule under which the judgment was entered. With regard to the Clerk's power to sign the judgment, the statute says this Court shall have power to order the Court below to enter judgment. The Court below could only act by its regularly appointed officer. See chapter 2 *Acts of 1880*, section 101. The Clerk can enter judgments under the statutes in certain cases, (defaults) and sign them without an order. The defendant was guilty of *laches* in his delay of twenty days in moving in the Court below. In case the Court should sustain this appeal, it should be without costs, as the other side are only proceeding for costs, and the rule on which this judgment is founded was drawn up after the model of rules previously granted by this Court. Cites *Taylor on Evidence*, section 71.

Tupper was not called upon in reply.

McDONALD, C. J., now, (March 18th, 1882,) delivered the judgment of the Court, allowing the appeal on the grounds following:—

1st. The order of this Court was irregular, and in excess of jurisdiction.

2nd. The judgment entered up in the County Court was irregular, the Clerk of that Court having no authority to enter judgment.

GRAHAM *v.* BOAK.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(*Decided March 18th, 1882.*)

Secondary Evidence of Record.

In an action to revive a judgment, secondary evidence of the record was admitted on proof of loss, and of the entries in the hand of the late Prothonotary in the judgment book, indicating that the roll had been filed and execution issued.

To an action to revive a judgment entered in February, 1864, in favor of plaintiff for $288, defendant pleaded, besides payment, *Nul Tiel Record.* The cause was tried at Halifax, in November, 1881, before McDONALD, C. J., when evidence was given as follows, on the part of the plaintiff, to prove the filing of a record:—

Martyr Nutting.—In 1864 my father was Prothonotary of the Supreme Court; I was his deputy in that year; the words in the margin of this page of the book in my hand are in my handwriting; this is the judgment book of the Supreme Court of that year, 1864. The writing on this page, 420, is that of my father, the Prothonotary of the Court; the handwriting in the body of the page is mine; the words in the margin of page 420, "Roll filed 2nd July, 1866," are in my handwriting; the words in the margin of the same book, "Ex. 2nd July, 1866," and "Ex. 23rd July, 1870," are in my handwriting; these refer to executions issued in this cause. When the record roll was filed I made an entry on the judgment, and marked the roll filed on the back; I have no recollection of roll being filed, except from the entry on this judgment; looking at this entry

in my handwriting, I should say decidedly the record was filed; I would not have made this entry on the margin of the judgment if the record had not been filed; this is my signature to this paper, "J. M. D., 1," the memorandum on the outside of this paper, "J. M. D., 2," is the handwriting of the late Sheriff Sawyer, and is signed by him; this paper is marked "returned" on the margin of the judgment in my father's handwri ting. *(Mr. Meagher* puts in judgment-book "J. M. D., 3," and paper "J. M. D., 1," and memo. "J. M. D., 2." Objected to by Mr. Graham. (McDONALD, C.J.—I admit them subject to objections.) Writ in original case of *Graham* v. *Boak* offered.) This writ is signed by me as Deputy Prothonotary, and the words "deft. 24th Feby., 1864," are in my handwriting.

Mr. Graham objects. Writ "J. M. D., 4" admitted.

Mr. Meagher proposes to ask "If he would issue execution in this cause if the roll had not been filed?"

McDONALD, C. J.—I reject it.

Cross-examined.—I was appointed deputy by my father, under written power of attorney. I signed my father's name by his direction.

M. H. Richey, M. P.—I was attorney for plaintiff, James R. Graham, in the original suit, *Graham* v. *Boak*. This execution was issued from my office, "J. M. D., 1." it was the invariable practice in my office to file the record before issuing execution on judgment, but I have no recollection of this case. Mr. Sutherland, who issued the execution, was at the time in partnership with me.

J. Parsons.—I am Prothonotary of the Supreme Court; have been so since 1st September last; at the request of M. H. Richey, I made search, in September last, for the record roll and execution in the suit of *Graham* v. *Boak;* my two clerks, Craigen and Noble, assisted me in the search; we searched in the box where the papers "J. M. D., 4" and "J. M. D., 1" were found; we also searched on the shelf where there were a number of executions; we also searched in a chest where there were some record rolls, and among the papers of that year; we have searched in every place where we had reason to suppose the papers would be, and did not find them.

Cross-examined.—I think I am familiar with most of the places of deposit in the office; I have not searched all the bundles in four green boxes in the office; these four green boxes chiefly contain the papers during the late Mr. Nutting's time; for some years the records were not with the papers in the causes; in the green boxes there were bundles of records which we examined during the search; I found no bundles of records for 1864; I think I looked through the bundles of records for 1866; we did not find bundles of records for 1864 and 1866 in the green box; the records for these years were filed with the original papers; the records for 1864 and 1866 were not in the green boxes; I think Mr. Richey handed me execution (No. 2) during the search; I don't know if he found it.

William D. Sutherland, sworn.—I am an attorney of the Supreme Court; was partner with Mr. M. H. Richey in 1866 I, during that year, had charge of the business of entering judgments, filing records, and issuing executions; this execution, "J. M. D., 1," is in my handwriting; I have no doubt a record was filed, but I do not recollect the fact; I always filed the record before issuing the execution.

Cross-examined.—I don't recollect this case at all; I did not file the record as a rule till I wished to take out execution.

After hearing counsel, the learned Chief Justice gave judgment as follows:—"I think in this case judgment must be entered for the plaintiff. The evidence of the filing and loss of the record is sufficient, in my opinion, and I think the docket of judgment and other papers in proof, together with the known legal meaning of the word record, is sufficient secondary evidence of the contents of the lost record."

A rule was taken to set the judgment or rule aside, and for a new trial, on the usual grounds, and was argued March 14th, 1882.

Attorney-General, in support of rule, cites *Chesley* v. *Bonnett*, 1 R. & C., 112; and *Harding* v. *Smith*, 1 R. & G., 336. There was really no secondary evidence of the record offered in this cause. The docket of judgment precedes the filing of the record. Cites *Saunders on Pleading*, 755; *Roscoe's*

N. P. Ev., 109; *1 Greenleaf on Evidence*, sections 508, 509; *Taylor on Evidence*, section 1309; *Id.*, sections 423, 424. The execution put in evidence proves nothing beyond the fact that a record was filed before the document purporting to be an execution issued. The execution itself cannot be read.

Meagher, Q. C., contra.—There is evidence that a record roll was filed in the cause. The Court should presume that the record was a correct and regular one. The Prothonotary, in issuing execution without a regular record roll being filed, would have been doing an illegal act. In *McDonald* v. *Ferguson*, 1 R. & G., 70, the form of record in case of judgment by default, as here, was held to be that authorized by section 68, chapter 94, *Revised Statutes*, and given in Schedue A, No. 11. Cites *1 Taylor on Evidence*, section 73. The cases cited on the other side from our own reports only shew that the record is the proper evidence of a judgment. His Lordship, in the exercise of his functions as a juryman, had a right to apply his knowledge of what the record would be in the case, upon the proof given that a record was filed.

Attorney-General, in reply.—The law presumes everything to have been rightly done only where the regularity of the proceedings themselves is not the issue to be tried. The issue here is whether a record was filed, and, if so, what was in it.

McDONALD, C. J., now (March 18th, 1882,) delivered the judgment of the Court, as follows:—

We think the Judge who tried the cause properly admitted the secondary evidence of the record, which we think sufficient to sustain the judgment, and that the rule *nisi* must be discharged, with costs.

LINDSAY *v.* CREIGHTON ET AL.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided March 20th, 1880.)

Use and occupation of wharf.—Verdict for defendant set aside.

PLAINTIFF brought suit for use and occupation of a wharf. Defendant pleaded never indebted and gave evidence that part of the wharf was built on a public landing over which the public had for a long period been accustomed to pass for the purpose of landing fish from their boats. Defendant contended also that plaintiff could not build a public wharf, without leave from the Crown. The Judge charged for plaintiff and the jury found for defendant, but the verdict was set aside with costs.

Assumpsit for the use and occupation by defendants of plaintiff's wharf during a period extending from May, 1873, down to March, 1880. The amount claimed by plaintiff in his particulars was $337.57. Defendants pleaded *nunquam indebitatus* and other pleas in general denial. The cause was tried before Mr. Justice SMITH, at Lunenburg, with a jury, when defendants adduced evidence to shew that a large portion of the wharf in question was built over a public dock. The evidence as to the circumstances under which the wharf was used by defendants was of a contradictory character. The learned Judge reported his charge to the jury as follows:—"I explained the nature of the action to the jury; I told them that it was an action brought by Mr. Lindsay, of Lunenburg, against the defendants, to recover from them a certain sum of money for wharfage, dockage and other use of a wharf erected and possessed by him in the harbor of Lunenburg; that the defendants, by their pleas, simply denied their indebtedness to the plaintiff, as alleged in their writ; that it was in evidence, and in fact it was undisputed, that the plaintiff had some ten years previously constructed a wharf at great expense upon property asserted by him to be covered by a deed from the late J. H. Kaulback to him; that he had, since the period of its construction, occupied it, and controlled it as a wharf, and had been paid wharfage from all parties landing goods thereon, until the defendants had resisted his right so to do, which had caused this action. The defendants had been partners in business connected with the schooner *Wellington*, and it was admitted on the trial that plaintiff could only recover against defendants jointly for their liability in respect

to this vessel; that the defence set up, which was substantially the only one, in regard to the liability of defendants to the plaintiff to pay the whole or part of the amount claimed, was that part of the wharf was built upon a public landing, over which the public had for a long period of time been accustomed to pass to and fro for the purpose of landing fish from their boats; that although I received the evidence offered to sustain this defence, I entertained serious doubts as to its admissibility under the pleadings, and I directed the jury to consider the plaintiff as entitled to recover from the defendants for the use of the wharf for such an amount as the testimony shewed the plaintiff was entitled to recover, irrespective of the claim set up by the defendants, arising out of the contention that the public rights had been encroached upon by plaintiff in the construction of the wharf. Even if such a defence were available under the pleadings, I did not consider that the mode in which the wharf had been used by defendants was an assertion of such a right, but, on the contrary, there was evidence to shew the reverse; but at the same time I did not leave this question to the jury. After calling their attention to the evidence of the use of the wharf by the defendants, in their capacity as owners of the *Wellington*, which was clearly proved, I left it for them to say what amount was payable by them to plaintiff for such use, under his claim, as set forth in his writ. I called their attention to the memo. given plaintiff by Captain Young as to the liability of defendants, and, after remarking generally upon the evidence, left it for them to say the amount the defendants should pay to the plaintiff." The jury found a verdict for the defendants, and the cause now came up for argument on a rule to set the same aside as being against law evidence and the Judge's charge.

MacCoy, Q. C., in support of rule.—The verdict was against the Judge's charge. *1 B. & P.*, 520. The Court will not try title in an action on the common counts. *13 East*, 149. Admitting that the whole wharf is built over a public dock, the defendant cannot use it and refuse to pay. He must abate the nuisance.

S. A. Chesley, contra.—The action is one for use and occupation of what is alleged to be the plaintiff's wharf.

There was no express contract, and there was a denial of the facts calculated to raise an implied contract. No ground is taken that the verdict is perverse. *Ontario Digest*, page 2568; *18 U. C. C. P.*, p. 192; *1 M. & R.*, 173; *Fisher's Dig.*, 6114. The action is essentially of the nature of use and occupation. The count in *Bullen & Leake* for wharfage is essentially different from that here. The goods here were landed under circumstances rebutting any promise to pay. The evidence shewed that the defendant remonstrated against plaintiff putting up the wharf over the public dock. (RIGBY, J.—But defendant put his goods on the wharf in ordinary course, as other people did. The use of the dock does not give a right to use a wharf built upon it.) To an action of trespass the defendant might reply that he used the wharf as a public way. A dock is a way. There is evidence that the place was occupied as a public dock. Some of the items sued for were admitted to be outlawed. All we have to consider are the items from May 8, 1874, which relate to three vessels. With regard to one vessel, the plaintiff's evidence was directly contradicted. With regard to another, other parties were interested who were not joined. The balance would not be more than $60. (MCDONALD, C. J.—We cannot settle that here. If there was anything, it must go back to the jury.) What the jury found was that there was no contract. (MCDONALD, C. J.—That is what you must shew.) There is no proof that Young ever paid wharfage himself. He collected wharfage from others, which he paid over as money had and received. (RIGBY, J.—The trouble is that the jury never found on the facts. The Judge withdrew this question of contract or no contract from the jury, and the cause should go back for a new trial, in order that the jury may find upon it.) *Roscoe*, 342. Under never indebted we have raised every defence that is open to us. *Woodfall's Landlord & Tenant*, 647. Use and occupation is founded on a contract, and unless there is a contract plaintiff cannot recover. *13 M. & W.*, 12. The defendant, from the first, stood upon his rights. (MCDONALD, C. J.—That question was never put to the jury.) The plaintiff should have become nonsuit. Plaintiff has not shewn himself entitled to collect wharfage. The right to allow a man to build a wharf for the

public accommodation is a prerogative of the Crown. (RIGBY, J.—There was evidence of a contract, express or implied. Was that submitted to the jury?) There is some evidence that was not. (RIGBY, J.—Then, in my opinion, that settles the matter.) A man has no right, without special leave from the Crown, to build a public wharf, even on his own land. *1 Broom's Commentaries*, 315.

MCDONALD, C. J.—We all feel that you have exhausted the case on the evidence, and that you cannot sustain your verdict. The rule must be made absolute, with costs.

McDONALD *v.* FRASER.

Before MCDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Attachment.—Cause of Action.—Indorsement on Writ.—Allowance of Writ.

THE affidavit for attachment against defendant, as an absconding debtor, set out that defendant was indebted to plaintiff in the sum of $82.82, for that plaintiff, by his promissory note, &c., promised to pay plaintiff, as guardian, $56.70, with interest, &c.; also that defendant was indebted to plaintiff *for expenses in connection with said note.*

Held, that, as there was nothing in the expression as to expenses to indicate a legal liability, the affidavit of a cause of action in that respect was not sufficient, but that a distinct "cause of action" was shewn, and could be gathered from the affidavit, to the amount required for an attachment, and, although the writ was not endorsed for the amount so shewn, but for a larger amount, (*i. e.*, including the expenses,) the attachment could not be set aside on that ground.

The endorsement of the amount need not be signed by the Commissioner, nor the writ allowed; MCDONALD, C. J., dissenting as to the necessity of signing the endorsement.

This was an appeal from a decision of the Judge of the County Court for District No. 5, discharging a rule to set aside a summons and attachment issued against defendant, as an absent or absconding debtor. The summons and attachment were issued in District No. 5, on an affidavit sworn before, and an order granted by, a Commissioner in District No. 6. The affidavit was as follows:—

I, William H. McDonald, of Antigonish, in the County of Antigonish, Physician, make oath and say as follows:

1st. I say that under and by virtue of letters of guardianship, I was appointed guardian of the children of

Edward Pineo, and am still such guardian, according said to letters granted by the Judge of Probate in and for the County of Cumberland, as on reference thereto will more fully appear.

2nd. I say that, as such guardian, Daniel C. Fraser is indebted to me in the sum of eighty dollars and eighty-two cents, lawful money of Canada, for that said Daniel C. Fraser, by his promissory note, now overdue, on the 11th day of September, A. D. 1876, promised to pay me, as such guardian, the sum of fifty-six dollars and seventy cents, with interest at seven per cent., but has not paid the same, or any part thereof; also, that the said Daniel C. Fraser is indebted *for expenses in connection with said note*, and the full amount due thereon at the present time is eighty dollars and eighty-two cents, currency of the Dominion of Canada.

3rd. I lastly say that the said Daniel C. Fraser is now an absent or absconding debtor, and beyond the jurisdiction of this honorable Court, being absent from this Province of Nova Scotia.

(Sgd.) WILLIAM H. McDONALD.

Sworn, etc.

Meagher, Q. C., in support of appeal.—The affidavit upon which the proceedings were founded is bad, including a sum as to which no cause of action is set out. *Morrison* v. *Morrison*, Thomson's N. S. R., 252; *Allen* v. *Caswell*, 1 Oldright's N. S. R., 405. The "expenses" forming part of plaintiff's claim are not shewn to be matter of any contract between plaintiff and defendant.

Tupper, and *Graham, Q. C.*, contra.—The affidavit is not to be construed on the same principles as a declaration of cause of action on the argument of a demurrer. It is sufficient that the plaintiff has sworn that the defendant is indebted for expenses in connection with said note, and has sworn to the whole debt being due upon the note. The truth of the affidavit is not to be tried in this application. Cites *5 Taunt.*, 743. *Morrison* v. *Morrison* was a different case, where a claim for an unliquidated amount was joined to a liquidated claim. The same strictness is not required in an affidavit as in a declaration, as to setting out cause of action.

st, 94. There is no requirement in the statute that we

should swear to a cause of action for the whole amount for which the writ is allowed. The writ may issue so long as there is a cause of action shewn to the amount of twenty dollars.

(RIGBY, J.—The sum of twenty dollars is named as the minimum jurisdiction of the Court. The amount must be shewn for which the property is to be attached.)

No allowance need be had at all of the writ. The endorsement on the writ of attachment need not be made by a Commissioner or a Judge.

(RIGBY, J.—The statute says in the same manner as an order for holding to bail.)

Section 31 of chapter 94 contains everything relating to holding to bail. There is nothing in that statute, or in the form corresponding, to require a Commissioner's endorsement.

(RIGBY, J.—I agree that we can take the first claim as a complete statement, provided we are not bound to go into a calculation from which we will perceive that the statement is wrong.)

This order should have been to set aside the "allowance," as they call it,—if there is such an allowance. The writ is all right if the previous proceedings are regular. *4 Dowl. P. C.*, 382.

Meagher, Q. C., in reply.—*Cummings* v. *Brown*, 2 R. & C., 303, applies to this case if the act of indorsing is a judicial act.

(*Graham*, Q. C.—If this is a judicial proceeding they should move to set it aside.)

The necessity for requiring strictness in an affidavit here is much greater than in affidavits to hold to bail, because the attachment is a lien on land for the amount when registered, and there is no means of reducing it. The authority to sever the bad from the good, under the English *Practice Act*, is by statute. *1 & 2 William IV.*, chapter 110, section 6; *Fisher*, page 350, and following cases.

(McDONALD, C. J.—The question with me is whether the word "expenses" in this affidavit is not as good as the word "usages" in the case cited against you.)

No, because there are no expenses connected with a note except for protesting, which would only be one dollar, whereas the amount to be accounted for here is about five dollars. *5 M. & S.*, 446; *1 B. & P.*, 58; *B. & L.*, 397, shews that the cost of protesting must be laid as a special count in the declaration, and therefore must be expressly set out in the affidavit. *9 C. B.*, 282; *Chitty's Forms*, 362; *Harrison*, p. 478. There are counts in the declaration that are not in the affidavit at all, and for which the writ could not issue.

RIGBY, J., (November 9th, 1882,) delivered judgment:—

An affidavit of a "cause of action," to the extent of eighty dollars and eighty-two cents, the sum sworn to as the indebtedness, has not been made in this case, unless the expression "for expenses in connection with said note" is sufficient to establish it; the amount of the note with interest from its date to the date of the affidavit falling short of that sum by over four dollars. The imperial statute of *12 George I.*, chapter 1, required that before the issue of a writ of *capias*, an affidavit should be made and filed of the "cause of action." The English decisions on the sufficiency of affidavits of causes of action made under this statute will be in point in determining the sufficiency of the affidavit before us, and were so considered in the case of *Morrison* v *Morrison*, hereinafter referred to, and in my opinion establish that as regards the "expenses" in question, this affidavit cannot be upheld. *Tidd*, at page 183 of his *Practice*, referring to such an affidavit, says: "It is also requisite that the affidavit should be certain and explicit as to the nature of the cause of action. Therefore an affidavit that the defendant is indebted to the plaintiff in such a sum, without more, or generally upon premises, or in so much, upon bond for performance of covenants, or upon breach of articles, or as a balance of accounts between the parties, has been held to be too general." There is nothing in the expression "expenses in connection with said note" to indicate a legal liability, nor to shew the nature of it. It cannot refer to the expenses of noting and protesting, as these should be laid as special damage, (*Bullen & Leake*, p. 104, note 'a,') but even if it was used to cover these, it was necessary to specify them with more particularity. A distinct

cause of action is, however, shewn in the affidavit, for a sum that can be ascertained with certainty from the affidavit, and being the amount of the note, with interest at the rate of seven per cent. from its date. The writ here was not, however, endorsed for this sum, but for the larger amount; and in *Morrison* v. *Morrison*, Thomson's N.S. Reps., at page 253, Judge BLISS, delivering the judgment of the Court, held that in such a case the whole proceedings must go. He says: "The plaintiff having thus united the two sums, and the attachment being for their joint amount, it must be good for the whole, or not at all. We cannot separate it into parts, and support for either one or the other of the above sums; and therefore, though unquestionably the affidavit would have been sufficient to support an attachment for the debt as sworn to, and no objection would have been taken to the writ if it had been limited to that sum, yet if the latter part of the affidavit, or the endorsement in respect of it, be insufficient or irregular, the whole process must be set aside. *Brook et al.* v. *Baine*, 5 Burr., 2690.; *1 Dowl., P. C.*, 318, 631." If this is sound law, then I think this appeal should be sustained, as this case comes directly within it.

In the reports from which I have extracted the above, it would appear on reference to page 250, that *Morrison* v. *Morrison* had been decided in Easter Term, 1846, but in the earlier volume of reports by the same author it is also reported at page 131 as of Hilary Term, 1840. In 1838 the case of *Jones* v. *Collins*, 6 Dowl., p. 526, was decided, and the Court there refused to recognize the cases referred to by Judge BLISS as authorities for his decision in *Morrison* v. *Morrison*. WILLIAMS, J., at page 533, says: * * * "the result is that the cases of *Drake* v. *Harding* and *Kirk* v *Almond* are no longer to be considered as good law. The case of *Prior* v. *Lucas* establishing this rule that, where the total amount sworn to is not mixed up with what is partly good and partly bad, but where distinct and separate causes of action in separate amounts are sworn to, one of which is properly and the other improperly sworn to, the affidavit is good as to that amount in respect of which it is correct, and that the Court will not discharge the defendant altogether for such an objection." The decision in *Jones* v. *Collins* was

confirmed in the Common Pleas, in 1849, by the case of *Cunliffe* v. *Maltass*, 6 D. & L., 723; 7 C. B., 695. COLTMAN, J., says in this case: "I think it is to collected from the cases decided before the *1 & 2 Victoria*, chapter 110, that if two distinct causes of action were stated in the affidavit to hold to bail, one of which was good and the other bad, the defendant was entitled, not to be discharged, but to have the bail reduced to the amount for which a good cause of action was shewn;" and again, as reported in *7 C. B.*, he says: "None of the cases cited bears out the proposition of my brother CHANNELL except the two cases of *Kirk* v. *Almond* and *Drake* v. *Harding*, *which have since been overruled*, and, in point of good sense, I see no difference between a case where the affidavit distinctly discloses one good cause of action and a case where it manifestly appears, upon looking at the whole affidavit, that a certain sum is due." WILDE, J.: "But it is said that the defendant is entitled to be discharged altogether, because he has been arrested for a larger sum than he owed, and this consequence was sought to be drawn from some observations made by ALDERSON, B., in *Chance* v. *Rigby*, which do not, in my opinion, warrant the argument;" and CRESSWELL, J.: "*Jones* v. *Collins* overruled the old cases, and establishes that a person may be arrested and held to bail for the smaller sum which is properly sworn to. It is suggested that there is a distinction between an arrest for the smaller sum only and an arrest in the first instance for the whole sum mentioned in the affidavit, and that that distinction was not pointed out in that case. I do not think the distinction material, and, although it does not appear to have been pointedly adverted to in *Jones* v. *Collins*, it is difficult to suppose that it was not before the Court, as it acted upon an affidavit under which the defendant had been already arrested for a larger sum than was duly sworn to." This is, therefore, now the recognized law, and I do not see why, we should apply a different rule to proceedings against absent debtors, by which their property only could be affected, than we would have to do in cases involving personal liberty. No final judgment can be obtained in the suit until a legal liability has been established by legal proof before a Judge of the Court, and if in such a case as this a defendant should apply to relieve his property from the

attachment, under section 23 of the Act, the cases I have referred to are sufficient authority, in my opinion, to enable the Court or a Judge to require bail only for the amount for which the affidavit established a cause or causes of action.

I do not deem it necessary to offer any opinion as to the jurisdiction of a Commissioner in one county "to grant or allow a writ of summons or attachment under the *Absconding Debtors' Act* to be issued out of the County Court" for another county, because I do not think that the law requires that such writs should be granted or allowed. It seems to me not to be essential that the endorsement on these writs should be signed by the Commissioner, but merely that the amount sworn to should be endorsed. Our existing statute relating to absent debtors provides that before the summons issues an affidavit of the cause of action shall be made, and the sum endorsed on the summons, *as in cases of holding to bail*, with or without a Judge's order. This procedure was first enacted in the third series of the *Revised Statutes*, by which also the previous legislation on the subject was repealed. The forms of the process given in the statute do not indicate that the endorsement is to be signed at all, and since that series of the *Revised Statutes*, there has been no legislation expressly requiring it to be done. In the 1st series of the *Revised Statutes*, chapter 141, section 2, the provisions relating to the affidavit and endorsement are very different. There it is enacted that the party *applying for the writ* shall make an affidavit in the usual form for holding the party to bail, and that the sum set out in the affidavit shall be endorsed on the writ in words at length, *and signed by the party before whom the affidavit was made*. This practice was preserved in the 2nd series of the *Revised Statutes*, and was similar to the provisions formerly existing in relation to application for a *capias*, which also required that the endorsement on that writ should be similarly signed. See 1st edition *Revised Statutes*, chapter 133, section 5. In 1853, however, and eleven years prior to the 3rd Series of the *Revised Statutes*, the so-called "New Practice Act" was passed, (chapter 4,) which expressly repealed the former statutes relating to arrest on *mesne* process, and introduced the present system, which was taken from the *Imperial Statute, 1 & 2 Vic.*, chapter 110. This

statute, although it refers to the sum endorsed on the *capias*, has no provision requiring that such endorsement should be signed, nor do the forms indicate it. Probably, as it became requisite to have an order to hold to bail, the signature of the Judge or Commissioner to the endorsement was not deemed essential. The *Imperial Statute, 12 George I*, chapter 28, already referred to, contained the provisions in force in England in relation to arrest on *mesne* process before the passage of *1 & 2 Victoria*, chapter 110, and it was enacted in section 2 of that statute that an affidavit of the cause of action should be made and filed, and the sum or sums specified in such affidavit should be endorsed on the back of the writ or process, for which sum or sums so endorsed the officer should take bail, and no more. This statute did not provide that the endorsement should be signed, and, on referring to *Tidd's Forms*, page 42, it will be seen that the form of such endorsement, there given, is signed, not by the party before whom the affidavit is made, but by the plaintiff's attorney, or agent, and in *Chitty's Forms*, page 390, (9th edition,) the form of endorsement is thus given: "Bail for £——, by order of (naming the Judge making the order,) dated this —— day of ——, 186–," which does not seem compatible with the idea of the Judge signing the order. So also in *Evans* v. *Bidgood*, 4 Bing„ 63, the endorsement is this: "Oath for £2,000. Affidavit filed in Cambridgeshire, 17th November, 1826."

I conclude, therefore, that, according to the English practice, it was not necessary that the endorsement on writs of *capias* should be signed by the Judge, either before or after *1 & 2 Victoria*, 110, and as there is no legislation requiring it to be done, and the express provision on the subject having been ommitted from our later legislation relating to absent debtors, I think such signature is not now required, and that the appeal on this ground must also fail.

JAMES, J., concurred.

McDONALD, C. J., concurred, except as to the necessity for signing the endorsement on the writ.

IN RE ASSESSMENT OF JAMES CROWE.

Before McDONALD, C. J., and JAMES and RIGBY, J.J.

(Decided November 9th, 1882.)

Assessment for Shipping out of the County.—Appeal from Decision of Municipal Council.

BY the *Revised Statutes*, (4th Series, 1874,) an appeal from an assessment was given to the Court of Sessions. In 1876 it was enacted that any party aggrieved by the decision of the Sessions could appeal to the County or Supreme Court. In 1879 the powers and authorities of the Sessions were "given to the Municipal Councils."

Held, that the power given to the Council to hear appeals from the assessment under this statute was subject to the condition that an appeal should lie to the County Court in the same manner as formerly from a decision of the Sessions.

The appellant appealed to the County Court against an assessment of $5,000 on "ships in other districts," which had been built but were not registered in the county in which they were assessed, and the County Court Judge, on the authority of *Kenny* v. *City of Halifax*, decided that they were not liable, but as it was shewn on the trial of the appeal that the appellant had a ship on the stocks, partially built, he amended the assessment to cover half the value of the said ship.

Held, that the Judge was correct in his judgment as to the non-liability for shipping out of the county, and that he could not, on the trial of that appeal, consider a different item of assessment, not submitted to the Court at all, as to the ship on the stocks, and the appeal must, therefore, be allowed.

This was an appeal from a decision of the County Court Judge for District No. 4, quashing an appeal to that Court from a decision of the Municipal Council, in a question of assessment. The facts are set out in the judgment appealed against :—

Upon the evidence given, it appears that the appellant in this case, who resides in this county, was assessed in District No. 2 on $5,000 for ships, and that he owned shares in three vessels, to the value of $10,000, which were built by him in the County of Colchester, but were registered in the City of Halifax. The value of his interest in these ships he estimates at $10,000, and if his shares in these ships are assessable in this county, the sum of $5,000 would be the proper sum on which to make the assessment for them. But it appears that these ships have never been in this county since they were registered, nor had one of them been in any port of the Province previous to the time when this assessment was made. They are foreign-going vessels, and were all afloat. Without entering elaborately into the question, I am of opinion that the statute relating to county assessment, with regard to the

property taxable within the county is sufficiently, similar in its clauses relating to this subject to the sections in the Halifax Incorporation Act, to authorize a decision similar to that given in the Supreme Court, at Halifax, in the case of *Kenny* v. *The City of Halifax*, 1 R. & G., 39, which decision was sustained, on appeal, in the Supreme Court of Canada. *3 Duval*, 497. If that decision applies, as I think it does, the assessors had no right to assess the appellant on the one-half value of his shares in these vessels. But it seems that the appellant had a vessel upon the stocks, in the course of construction, within the county, which, at the time of the assessment made, he valued at between two and three thousand dollars. On one-half of the value of this ship, under the law, I think he is liable to taxation. Estimating one-half the value at $1,250, this is the sum to which, in my opinion, the assessment on his ships should be reduced. My judgment in this case would be in conformity with this view were there no other difficulty in the way. It is contended by the counsel in support of the assessment made that the Court has no jurisdiction; that the appellant was not legally entitled to appeal to this Court. Of the right of appeal I had strong doubts from the first, but allowed the case to go on, reserving the question of jurisdiction or right of appeal to be decided at the close. Section 61 of chapter 21 of the *Revised Statutes*, (4th Series,) provides that any person aggrieved by the assessment may appeal to the next Sessions held in the county, or to any special Session for hearing appeals, etc., and chapter 29 of the Acts of 1876, provides for the incorporation into that section, by adding to the end thereof, the words: "Any party aggrieved by the decision of the general or special Sessions, may appeal therefrom to the County or Supreme Court for the County. * * * The Court of Appeal may inquire into the matter *de novo*, and examine such witnesses, and take all such proceedings as may be required for a full investigation of the case." While the Court of Sessions had power to act in such matters of appeal to them, an appeal from their decision to this Court or the Supreme Court, whichever should next sit in the county, could be had under section 61, chapter 21, *Revised Statutes*, with the clause in chapter 29 of the Acts of 1876 added thereto. But by the *County Incor-*

poration Act of 1879, chapter 1, section 79, the power and authority which, in chapter 21 of the *Revised Statutes*, (4th Series,) are given to Justices in Sessions, general or special for carrying out any of the provisions of that chapter, are given to the Municipal Councils, and by section 92, chapter 1, (Acts of 1879,) all appeals which now lie to the Sessions of any county or district shall lie to the Municipal Council, but no provision is made in that chapter or elsewhere for an appeal from the decision of the Municipal Council to this Court in the matters of assessment, so that while the law provides for an appeal against rates to the Municipal Council, I regard chapter 29 of the Acts of 1876 as inoperative, since there is no Court of Sessions from which such appeal can be taken. I am therefore of opinion that there is no authority for any appeal from the Municipal Court to this Court in the case of assessment, and with this view the appeal taken should be quashed.

Weeks, in support of appeal.—There was an appeal to the Sessions. Now it is to the Municipal Council. The appeal given from the Sessions to the County Court must also lie from the Municipal Council, which has been substituted for the Sessions *Acts of 1876*, chapter 29, section 1; *County Incorporation Act 1879*, chapter 1, section 79.

Sedgewick, Q. C., contra.—The County Court is an inferior Court, having only such jurisdiction as is given by express statute. The statutory power *quoad hoc* is only to hear an appeal from the Sessions. The *County Incorporation Act* provides only that the powers and authorities formerly held by the Sessions should be given to the Council. This is not a power or authority of the Sessions or Council. They have nothing to do with the granting of the appeal. The right of a litigant to appeal from a decision is not a power or authority of the Court from which the appeal is taken. (RIGBY, J.—Section 92 of the *County Incorporation Act* is in your favor.) The Municipal Council is not a Court. This is not an appealable case at all. An appeal can only be in a cause. There cannot be an appeal from this order of Judge BLANCHARD'S. This appeal, further, is to the County or Supreme Court. Having elected the County Court, he cannot have another appeal to this Court.

Weeks replied.

MCDONALD, C. J., (November 9th, 1882,) delivered the judgment of the Court:—

Mr. James Crowe, a shipbuilder and shipowner, at Old Barns, in the County of Colchester, was assessed upon his real and personal property in that district for the year 1881. Among other personal property he was assessed on the value of "ships in other districts, $5,000." Against this latter item Mr. Crowe appealed to the County Council, who affirmed the assessment. Against this decision he appealed to the County Court, at Truro, where the matter was tried *de novo*, and the evidence of Mr. Crowe taken. The learned Judge of the County Court decided, and properly, in my opinion, that, on the authority of *Kenny* v. *The City of Halifax*, and on the facts testified to by Mr. Crowe, he was not liable to be assessed for the sum of $5,000 set down in the assessment roll for "ships in other districts." It appeared, however, that, at the time of the assessment, Mr. Crowe had a vessel in his shipyard, at Old Barns, in the course of construction, and at the trial before the County Court it was contended that this property was not included in the assessment, and that the value should be added to the roll. The appeal was by the party assessed against a specified item of the assessment, and I do not think that it was on the trial of such appeal competent for the Court to entertain an application by the appellee to amend, alter or vary the assessment in items not challenged before the County Council. On this point, therefore, I think the learned Judge below was wrong. The main question, however, was the jurisdiction of the County Court to entertain the appeal. By chapter 21, section 61, *Revised Statutes*, (4th Series,) "any person aggrieved by the assessment," etc., might appeal to the next Sessions, etc., who might either set aside or lower the rate on such person, and finally determine the appeal, as they should see fit. Chapter 29 of the *Acts of 1876* enacted as follows:—"The following clause is *added* at the end of the sixty-first section of the chapter hereby amended, that is to say: 'Any party aggrieved by the decision of the general or special Sessions may appeal therefrom to the next Term of the County or Supreme Court of

the County,'" etc. The sixty-first clause of chapter 21 of the *Revised Statutes*, therefore, must after this be read with the addition thus made thereto, and this gave an appeal to the general or special Sessions against an assessment, *subject* to an appeal from their decision to the County Court. The *County Incorporation Act of 1879*, namely, chapter 1 of that year, provided for the necessary transfer of the powers and authority theretofore exercised by the Sessions in these words, (section 79,): "The powers and authorities which, in chapters 15, 21, etc., etc., of the *Revised Statutes*, of the 4th Series, are given to Grand Juries, Justices in Session, general or special, etc., for the carrying out the provisions of those chapters *are given* to the Municipal Councils," etc. Now it is admitted that under the provisions of this section, the power of hearing and deciding appeals from assessments, (theretofore vested in the Sessions) was transferred and legally vested in the Municipal Council; but it is denied that that power is subject to the limitation and appeal provided by the Act of 1876. The provision made for appeal by the statute of 1876 was, at the passing of the Act of 1879, as much a part of chapter 21, section 61, of the *Revised Statutes*, as any other power, authority, or restriction conferred or imposed by its language. The power to hear appeals was thereby expressly conferred upon the Court of Sessions, the same power to hear appeals from the Sessions was conferred upon the County Court, and was a restriction upon the powers of the Sessions existing at the time of the transfer of the powers of the Sessions to the Municipal Council. The Municipal Council assumed those powers then possessed by the Sessions to the full extent to which the Sessions could before lawfully exercise them, and subject to all the conditions, restrictions, and control to which the Court of Sessions was by law subjected. The right of appeal to the County Court was one of these conditions or restrictions, and a very important one, and, in my opinion, on every conceivable principle of construction, the right of appeal from their decision passed with their right to hear appeals, under section 79 of the *County Incorporation Act*.

I think, therefore, that the appeal must be allowed, and that appellant have judgment on his appeal in the courts below and in this Court.

IN RE ESTATE OF GEORGE SMITHERS.

Before McDONALD, C. J., JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Submission and Award.—No estoppel between other parties.

THE surviving executor cited the parties interested in the estate of the deceased to attend for the purpose of a final settlement, and a preliminary question was raised as to whether all matters in dispute had not been settled by an award. The award in question resulted from a submission to which the executor and executrix alone were parties, and recited differences between those parties only. It appeared that other parties than those were interested in the estate, viz., the children and the creditors of the testator.

Held, That, whether the parties to the submission were or were not estopped, as there were other parties interested, the Judge of Probate should have overruled the preliminary objection and decided upon the evidence independently of the submission.

This was an appeal from a decree of William SUTHERLAND, Esquire, Judge of Probate for the County of Halifax. The appellant, as surviving executor of the estate of George Smithers, obtained and published a citation, calling upon those interested in the settlement of the estate to attend the Court to examine his accounts, with a view to a final settlement. The residuary legatees appeared, and objected to a charge made by the executor against the estate, amounting to between $4,000 and $5,000, on the ground that the amount so charged had been settled by arbitrators, to whom all matters in difference respecting the affairs of the estate were submitted. The Judge of Probate made his decree in conformity with the finding of the arbitrators, which was as follows:—

"The arbitrators appointed between Maria Smithers and George Smithers, having examined all the accounts submitted to them, with the evidence furnished by both parties in connection therewith, do hereby award as follows:

1st. They find the interest of the several parties one-third each in the business of Smithers & Sons.

2nd. They find that George T. Smithers, one of the executors of said estate, owes the estate of George Smithers, deceased, the sum of ($5,612.31) five thousand six hundred and twelve dollars and thirty-one cents, the same being due in cash as follows:—$3,651.14 on the 30th day of June, 1870, being balance of partnership accounts; $279.20 received from Mr. Shannon for account of Cassidy's estate, on 30th day of

December, 1871; also, the sum of $32 received for a horse and sleigh, and $1,650 on the 10th day of June, 1872.

They also find that the said George Smithers is indebted to the said Maria Smithers in the sum of $1.990.36, being for rents due to 30th day of June, 1874, and interest on $1,650 to said date."

From this decree the executor appealed, on the following grounds:—

1. Because it does not appear, from the terms of the submission and award referred to in said decree, that the appellant's account against the estate of George Smithers, for payments as executor of said estate, were taken into consideration in said award.

2. Because, by the terms of said award, it is clear that the account of appellant against the estate was not taken into consideration and awarded on by the arbitrators in their said award.

3. Because it is not competent to explain, alter or vary the terms of the award by parol evidence, and it is clear from said award, without any such parol evidence, that the account of appellant against the estate of George Smithers was not considered by the arbitrators in making such award.

4. Because the evidence produced in said Probate Court shews conclusively that the account was not taken into consideration by said arbitrators in making said award.

5. Because said decree is against evidence.

6. Because said decree is contrary to law.

7. Because the legatees and heirs-at-law of the said George Smithers, deceased, not being parties to the submission on which said award is based, the award is not binding on them and the surviving executor.

8. Because the said appellant is not bound by the said submission and award as regards his partial or final accounts in the settlement of the estate of George Smithers, deceased.

9. Because the said submission is only between the co-executors of the said George Smithers' estate, and said arbitrators had no power thereunder to settle the accounts between one executor and the estate of the said George

Smithers, or the legatees under his will, and the appellant is not bound thereby.

10. Because the decree is not final and conclusive, and does not dispose of the question in dispute before the Judge.

Ritchie, Q. C., in support of appeal.—The award should not have been introduced below, nor should evidence have been admitted to explain it. The award was not binding, as we were bound to account fully, irrespective of it. *5 El. & Bl.*, 447. (*Meagher, Q. C.*—That point was not taken below.) The award would not have been binding against the legatees, and cannot, therefore, be evidence for them. There is no pretence that any credit of $4,000 was given. It is apparent, on the face of the award, that that amount was not credited.

Attorney-General, and *Meagher*, contra.—Evidence was not admissible to vary the award, but it was perfectly competent to introduce evidence to shew the surrounding circumstances when the arbitrators made their award. The general principle is clearly put in *1 Kerr*, 207. Extrinsic evidence was there received to shew the circumstances under which a statute creating a trust was passed. *1 M. & K.*, 602; *9 C. & F.*, 556; *5 N. & M.*, 524; *3 M. & G.*, 452; *5 M. & W.*, 368. As to admissibility of evidence of the arbitrators, *L. R., 3 Exch.*, 324; *L. R., 3 House of Lords*, 437. The arbitrator may be examined as to what he took into consideration. No exception was taken to the evidence now sought to be excluded. *L. R., 6 Eq.*, 429. Evidence is admissible to show a mistake in an award. *L. R., 10 C. P.*, 388. The evidence given below was only cumulative, and we are entitled to uphold the judgment independently of the evidence so received, on the submission. The executor has invoked the award to establish a balance, which is the starting-point of his account, and how is it possible for him now to say that it is not binding, and should not have been received. The award is the basis of his whole account, and the only question was whether he was entitled to reduce that by certain amounts which we said were included in the submission. He had carried on the business for six years without making up any inventory. He could not get on without the award. His account could not have been passed. The estate consisted of a share of the business and a lot of

real estate, of which the net income was to go to the wife for life. The executor's account for $4,000 may have been allowed out of the income of the estate, and out of the interest of the father in the business, or may have been disallowed altogether. In either case the executor is bound. The case cited from *5 El. & Bl.*, 447, has no application to the present. There the parties to the award were not parties to the suit, and the decision proceeded entirely on that ground. *Russell on Awards*, 534; *Ritchie's Equity Dec.*, 162. The Court will not consider other grounds of appeal than those filed. The Judge below has found that the executor was bound by that award. Nothing was before the Court except our contention that Mr. Smithers was bound by that award. (McDONALD, C.J. —The award binds him as between himself and his mother, the parties to the award, but not as respects the rights and claims of other people.) His position is that he seeks to bind other parties by the award, and to refuse to be bound by it himself.

Meagher.—The arbitrators found that George Smithers owed the estate $5,612.34, of which they give the items. This award was binding upon the executors. *15 Grant*, 331. In his account he starts with giving the estate credit for the amount found by the arbitrators, and then, on the debit side, all the amounts he had ever paid out, including sums comprised in the award. I contended that the award should be held conclusive, or else should be abandoned altogether, and the accounts in detail gone into on both sides. This proposal was repudiated, and the Judge, at the instance of the counsel for George Smithers, insisted that we should commence with the award. (The COURT.—The case in *Grant* decides that, as between the executors, the award is final. The executor himself, who is a party, is bound by it, but the beneficiaries may claim more from them than the amount awarded, and the executor who was a party to that award may be liable to the beneficiaries if the amount was too small.) The very thing we ask is that the award should be held to bind the executor, George Smithers. The arbitrators must be held to have done their duty, and decided the matters before them. The very amount claimed by Smithers was included in the

submission and the award. The Judge has clearly found that it was included in the award, and the evidence bears him out in coming to that conclusion. It was the duty of the arbitrators to consider that matter, and the Court will not presume that they did not. If the arbitrators were violating their duty, they should have applied to revoke the submission. *2 Exch.*, 344.

Attorney-General.—The reference here took place six years after the father's death. It is perfectly possible, then, for the $3,654 in the award to represent the result of an accounting in which the share of the business and the amount disbursed were offset to rents, etc., received for estate property. It is not our business, however, to prove that this dispute was considered by the arbitrators, or to shew how it can have been included. It is enough for us that it was included in the submission. The phrase used by George Smithers that the amount was not in dispute before the arbitrators does not mean that they did not consider it, but that the figures were not disputed. He says the same of items that are distinctly allowed by the arbitrators. It is immaterial to us whether the award is against George Smithers as an executor or as a debtor of the estate. *Russell on Awards*, 110. There is not one tittle of evidence for the $5,000 of disbursements claimed. *2 B. & Ad.*, 925. We say that Smithers is estopped from setting up that the award is inconclusive, and further, that he cannot, after setting up the amount himself, say that it is not binding on him. Again, it is clear, on the evidence, that these disbursements were considered in the award, and it is of no consequence whether this decision of the arbitrators was right or wrong, or even inequitable.

Meagher.—It is open to us to shew that there was a parol submission outside of the written submission. We could give evidence to show what was before the arbitrators. *L. R. 2 Ex.*, 344.

Ritchie, Q. C., in reply.—The property was held jointly by the executor and executrix during the life of the latter. No inventory was filed at the proper time, but an inventory was finally filed, with which all parties must be presumed to be satisfied, because no objection was made. The executor must

account for everything included in this inventory, and be charged with the inventory value, unless he proves it to be less. In regard to the award, to be binding between parties it must be mutual. The present case in this respect is clearly within the case in *5 El. & Bl.*, and nothing has been shewn to the contrary. We don't want the award. All we desire is to settle the estate in the ordinary way, accounting for every item in the inventory. *Russell on Awards*, 532.

JAMES, J., (November 9th, 1882,) delivered the judgment of the Court:—

This is an appeal from the final decree of W. SUTHERLAND, Esq., late Judge of Probate for the County of Halifax. The circumstances are succinctly stated in the decree as follows:—

"The surviving executor of this estate, having obtained and published a citation calling upon those interested in the settlement to attend this Court for the purpose of examining the accounts and vouchers of the executor, a preliminary question has arisen as to whether the accounts and all matters connected with this estate had been finally adjusted, decided and settled by certain arbitrators, who had been appointed to settle all disputes regarding the estate of George Smithers, up to 15th July, 1874. It appears by the evidence that the testator, George Smithers, departed this life in the year 1868, having, by his last will, left his wife, Maria Smithers, the executrix, and George T. Smithers, one of his sons, executor, and bequeathed the interest arising from his property to his wife during her life. The executor, George T. Smithers, and his brother, William J. Smithers, had been partners with the testator, George Smithers, and disputes had arisen between the mother, the executrix, and the son, George T. Smithers, respecting the affairs of the estate, and it had been mutually agreed that all matters in difference relative to the business of the estate should be left to reference, and on the 10th day of June, 1874, articles of agreement were entered into and executed between Maria Smithers, executrix of the estate of George Smithers, painter, of the one part, and George T. Smithers, executor of the said estate, of the other part, in which it was recited that 'differences have arisen between the said parties in reference to the estate of the late George

Smithers, which differences they are willing to leave to the arbitrament of John D. Nash and Edward J. Lordly. Now, for the final ending of all such questions and disputes, it is agreed that the matters in difference in reference to the estate of the late George Smithers, and to the interests of the parties therein, and to the business transactions connected therewith, or arising out of the same, and all matters and things belonging thereto, shall be and are referred to the award, order and final determination of John D. Nash and Edward J. Lordly, whose award, if made in writing, shall be final, binding and conclusive on all parties; and in case the said John D. Nash and Edward J. Lordly shall not agree upon the said award, it shall be lawful to appoint Edward C. Twining to be umpire.' The evidence produced to this Court shews that the arbitrators met and entered upon their duties; that all the arbitrators, including Mr. Twining, heard the matters in dispute, which were submitted to the referees. A number of witnesses were called and examined before the arbitrators. It is contended on the one side that all questions respecting the estate were submitted to the arbitrators, and they had the materials, by means of the accounts produced before them, to finally determine all matters relative to the estate; and on the other side it is contended that only some of the matters in difference were determined; that certain sums of money for commission, four per cent. on collection of partnership debts due to the estate, one thousand dollars for stock over-rated, and some few other charges were not considered by the arbitrators, but were rejected; in other words, that the arbitrators did not perform their duties. Let us look at the testimony, and see which of these two allegations is borne out. The opinion to be arrived at is so important that I have carefully examined the evidence to be convinced that I have not formed an unguarded decision."

After examining the evidence, of which he gives full extracts, he arrives at the following conclusion :—

"I do not entertain a doubt that all the questions connected with the executors' accounts were before the arbitrators for their consideration, and if they did not consider them or deliberate upon them, they failed to perform their duty. Mr. George T. Smithers declares that he made his claim for the one thousand dollars, and for the four per cent. commissions,

and for those charges which he has mentioned. The accounts and vouchers, and all other materials necessary to make up an award, were produced and handed to the arbitrators, and if they omitted any item, or did not determine upon any matter, it was not from want of the requisite information."

He then proceeds to discuss the law, and after citing and extracting from several cases, states the result as follows:—

"I think that the authorities warrant the conclusion that if all matters in dispute are submitted to arbitrators under reference to determine all such matters in dispute, any award they may render, though they may misapprehend the law and the facts, is binding and conclusive." And after giving the substance of the award, he concludes as follows: "In my apprehension, this award is clear and decisive, and disposes of all matters respecting the accounts and dealings with George T. Smithers, up to the period of making the award, or up to the time when the balance is stated in Book B, being the 15th July, 1874. I decree that the balance, as it appears at that date, with the addition in pencil in that book, amounting to $274.10, making in the whole $5,338.39, be the amount of charge made against George T. Smithers up to 15th July, 1874."

The learned Judge thus decided that the surviving executor was so completely estopped by the award that he could not be allowed, in the settlement of the estate, to shew that the arbitrators committed any error of law or of judgment or that the case was not fully before them in such a way as to amount to a settlement of the whole estate, or any other material fact affecting the ultimate result. He decided this, and made a final decree, settling the estate upon the preliminary objection; completely shutting out the consideration of the evidence on the part of the executor. It is not necessary for me to criticise the learned Judge's statements, either of the evidence or the law, which I have given in his own words, and, I have no doubt, are correct as far as they go. But he has omitted reference to one very important fact, and that is that the reference and award, by which the executor has been held to be estopped, are not between the same persons who are parties to the investigation for the settlement of the estate attempted to be held before him. The submission recited that differences had arisen between George T. Smithers, executor, and Maria

Smithers, widow and executrix of George Smithers, in reference to the estate, and these differences, and these only, the arbitrators were called upon to decide. Other parties were interested in the estate. For instance, the will shews that after his wife's death, the property was to be divided among his children; and the evidence shews that there were creditors. These were not represented or even mentioned in the submission or award, as they would have been had it been intended that the award should be in lieu of the settlement expressly provided by law in section 55, chapter 90, of the *Revised Statutes*. This enactment provides that the executor, shall cite the "creditors, legatees and next of kin," any of whom can compel him to take out the citation, and proceed to the settlement of the estate, and no previous arrangement of the executors between themselves, friendly or otherwise, however full and explicit, can relieve the executor from this obligation, or take away the right of the "creditor, legatee, or next of kin" to demand an independent investigation. It is unnecessary to decide whether, had the executrix survived, and had further disputes arisen between the same parties, either of them would have been estopped by the submission or award; but we cannot but hold that an arrangement, whether intended as a general and final settlement of the estate, or as a mere temporary arrangement between two of the parties interested, (and certainly it does not appear to have been of the former character,) cannot be of any avail as between the surviving executor and third parties, of whom the executrix is not even one, as she was not living when the decree was made. We think the learned Judge should have overruled the preliminary objection, and decided upon the evidence submitted to him, independently of the submission and award. And as he has not done so, we do not think the intention of the law has been fulfilled, and the decree must be quashed, with costs.

McRAE *v.* DUNLOP.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Measure of damages in action for Escape.

In an assessment of damages after default in an action against a sheriff for an escape, the Coroner directed the jury that if the debtor had been allowed to escape through any negligence in taking the proper precautions to prevent such on his part, they were bound to find the full amount, "or at least heavier damages."

Held, That this was a misdirection, the proper measure of damages being the pecuniary value of the custody at the moment of escape.

This was an action on the case against the Sheriff of Victoria County, for the escape of an alleged debtor arrested under a writ of *capias*. Defendant suffered default, and damages were assessed before a coroner and jury at the full amount of the judgment debt and costs. The cause came on for argument on a rule *nisi* granted by the full Court to set aside the finding of the jury and grant a new assessment before a Judge of the Supreme Court. The main grounds on which the finding was attacked in the rule were disqualification on the part of a juror, the charge given by the coroner to the jury, and excessive and illegal damages. Affidavit was made by the defendant and his attorney that one of the jurors, previous to the assessment of damages, had expressed the opinion that the sheriff should be taught a lesson, and that this fact was brought to the notice of the coroner, who, notwithstanding, permitted the juryman to serve. The coroner charged the jury that if they came to the conclusion that the sheriff allowed Morrison (the debtor) to escape through any negligence in taking the proper precautions to prevent such on his part, they were bound to find the full amount, or, at least, heavier damages; that if the escape had been accidental, they should find some damages. They were bound, as the defendant rendered himself liable by his suffering judgment to pass against him by default.

Ritchie, Q. C., in support of rule.—One juryman, before the hearing, expressed a strong opinion that the sheriff should be taught a lessson. The man sat on the jury, though objected to. We could not strike him off. The minutes were

imperfectly and improperly taken by the coroner. There is no evidence, even on the minutes as they stand, of actual damage. There is no evidence of a debt.

Alexander McDonald, contra, reads affidavits in reply.

McDONALD, C. J.—The coronor's own affidavit explains his charge reported in his minutes, and shews that he mis-directed the jury in telling them they might find for the "full amount or for heavier damages." The statute says the damages shall not exceed the amount in the execution.

RIGBY, J.—The coroner has evidently, from your affidavits, not pointed out to the jury the distinction between negligence and gross negligence.

McDONALD, C. J.—The only evidence of negligence is that the sheriff took a guarantee, instead of allowing the prisoner jail limits on the usual bonds.

A. McDonald continues.—When the sheriff allows his prisoner to go outside the jail walls, and to have the range of jail limits, it is at his peril; it is his place to secure himself. If his prisoner escapes, he is liable for gross negligence, or connivance. The plaintiff has nothing to do with the security taken by the sheriff, and can take no assignment of it. No objection was taken to the alleged mis-direction at the trial. *6 Taunton*, 337; *7 M. & W.*, 102. In fact, the evidence shews that the points relied upon for mis-direction were waived at the trial, when the counsel agreed upon the issue to be submitted to the jury. *4 T. R.*, 611. We have proved that the prisoner had personal property. The sheriff admits, in his return to the *capias*, that he took security when he allowed the prisoner jail limits.

Tupper follows.—Where proceedings before a sheriff's or coroner's jury are attacked, the motion should be to set aside the writ of inquiry, and that motion cannot be made till the writ is returned. The rule *nisi* here asks for an order for an assessment before a Judge; the assessment before a Judge or the Court, provided by section 72 of chapter 94 *Revised Statutes* is only in cases of debt. In *Fisher's Digest*, under head, "Writ of Inquiry," the cases shew that verdicts of sheriffs' juries are set aside in this way, by moving to set

aside the inquisition itself. See *10 Moore*, 106. This case shews, at the same time, that what happened before the Court can only be shewn by affidavit; the sheriff's minutes must be verified by affidavit. The minutes brought here by the other side are not only not verified, but contradicted by affidavit. Cites *3 T. R.*, 301, where the motion was to set aside the writ. The defendant has admitted, by his default, all the allegations in plaintiff's declaration. One of the necessary allegations in the action is the amount of the debt. It is for the defendant to give proof diminishing the damages, and he can only do that under plea. That the allegation of the debt is material is shewn in *Chitty on Pleadings*, 650, where a plea is given raising an issue upon it. The shadowy evidence of the debtor's insolvency, which is contradicted, cannot affect the damages. *5 D. & R.*, 276; *8 Dowl. P. C.*, 735; *1 B. & P.*, 368; *16 M. & W.*, 346. In the last case an inquisition had been held before a Judge, and the question was raised whether the verdict could be set aside for mis-direction. It was held doubtful whether the direction of the Sheriff was a matter for review. To set the finding aside on the ground that the damages are excessive, it must be shewn that they are inordinate, or that the jury have been actuated by improper motives, or have proceeded on a wrong principle. *Hilliard on New Trials*, p. 381, section 173; also section 179.

Ritchie, Q. C., in reply.—There is an essential difference between damages for an escape from arrest under final process and under *mesne* process. Our statute limits the damages for an escape under final process. The agreement between the counsel as to the issue was simply to submit the question of the manner of the escape. Even before our statute, the plaintiff never was allowed to recover the full amount of the debt for an escape under *mesne* process. *2 B. & Ald.*, 64. The sheriff could not be in a worse position than the bail would be. Under an execution, plaintiff has the body for the debt; under a *capias* he has it merely to be produced when judgment is entered. *1 M. & W.*, 704; *4 M. & W.*, 145; *11 C. B.*, 371. As to mis-direction of the sheriff being a ground for setting aside the verdict, see *9 Dowl.*, 143. This inquisition can be sent to a Judge at *nisi prius*. See

Tidd's Practice, 487, 575. The authorities cited on the other side to shew that we have not taken the right proceedings shew that the rule is to set aside the inquisition, that is, the proceedings under the writ, which is precisely what our rule does. It orders "that the verdict or finding of the jury under the writ of inquiry, * * * the returns thereto, and all proceedings thereon, be set aside," &c. The writ could not be set aside, as it is perfectly regular. It does not require to be set aside to issue a new writ, as it has been returned, according to law, ten days after the assessment, and has expired. An execution returned does not need to be set aside to issue another.

McDONALD, C. J., (November 9th, 1882,) delivered judgment as follows:—

This is a rule *nisi* to set aside an inquisition of damages taken before a coroner for the County of Victoria, in an action against the sheriff of that county for the escape from his custody of a party arrested on a writ of *capias* issued out of the Supreme Court. The rule was taken on several grounds, alleging various irregularities in the proeeedings, but from the view I take of the case, it is only necessary to refer to that of mis-direction to the jury by the presiding coroner on a point of law. The coroner reports his charge to the jury to have been in these words:—"The Court addressed the jury, saying that, after the addresses to which they had just listened, anything that he could say would not make the matter clearer, or enable them the easier to find a verdict; the issue was as left to them by both the attorneys; if they came to the conclusion that the sheriff allowed Mr. Morrison to escape through any negligence in taking the proper precautions to prevent such on his part, they were bound to find the full amount, or, at least, heavier damages; that if the escape had been accidental, to find some damages. They were bound, as the defendant rendered himself liable by his suffering judgment to pass against him by default." Under these instructions, the jury found for the full amount of the judgment entered by default in the original cause. It is not so surprising that the coroner, who is not a lawyer, should have misapprehended the law, as that the counsel engaged should

have failed to suggest to him the principles which should govern his directions to the jury. As it is, there can be no doubt that the verdict was the result of misapprehension on the part of the coroner, and, consequently, misdirection of the jury by him.

In actions of this kind, the true measure of damages is the value of the custody of the debtor at the moment of the escape, and no deduction ought to be made on account of anything which the plaintiff might have obtained by diligence after the escape. *Arden* v. *Goodacre*, 11 C. B., 371; *Hemming* v. *Hale*, 7 C. B., N. S., 487. The detention of the body of a debtor is a remedy of a peculiar nature. The debtor's body itself is of no value to the creditor, and it is only as a means of putting pressure on the debtor that his arrest is of any avail. The measure of damages is stated in *Arden* v. *Goodacre* to be the value of the custody of the debtor at the time of the escape. That value can only be estimated by seeing what the value of the effect of the pressure is likely to be." *McRae* v. *Clarke*, L. R., 1 C. P., 403. SMITH, J., in the same case, said: "The value of the custody of the debtor depends upon the probability there is that the creditor will obtain payment of his debt by means of it." The case was not put to the jury in this light, but, on the contrary, they were instructed that if negligence appeared on the part of the sheriff, he would be liable for the full amount of the debt for which the party was arrested, and there is therefore clear mis-direction by the coroner. The inquisition will be set aside for mis-direction of the sheriff, or where the sheriff or jury have been mistaken in point of law. *8 D. & R.*, 69; *Tidd's Practice*, 582.

Since writing the above a case in point has been decided in Queen's Bench Division on the 26th January last, and reported in the weekly notes to *Law Reports*. I refer to the case of *Wigsell and others* v. *The Corporation of the School for the Indigent Blind*, which is reported as follows:

Damages for breach of contract—Cost of performance not the measure of. Rule to set aside the assessment of damages upon a writ of inquiry on the ground that the damages were excessive, and that the under-sheriff mis-directed the jury. The action was for breach of a covenant by the lessees of certain land to enclose the same from adjoining lands of the

lessor by a wall. It appeared probable that, as matters had turned out, the erection of the wall would not have increased the value of the adjoining land of the lessor to anything like the amount which it would have cost to build the wall. The under-sheriff allowed the amount that it would cost to erect a wall in conformity with the covenant to be considered by the jury as one of the heads of damage for breach of the covenant.

Willis, Q. C., and F. Turner, for the plaintiffs, shewed cause.

Crump, for the defendants, supported the rule. *Cur adv. vult.*

January 26th, the Court, (FIELD and CAVE, JJ.,) held that the rule must be made absolute, on the ground that the true test of the damages for the breach of the covenant was the pecuniary amount of the difference between the position of the plaintiff upon the breach of the covenant and that which it would have been if the covenant had been performed, and that under the circumstances the cost of building the wall was not a correct test of the damages. Rule absolute.

Mr. Tupper, at the argument, took the ground that the defendant should have attacked the writ, and not the verdict or inquisition. The rule *nisi* is that "the verdict or finding of the jury, under the writ of inquiry, etc., be set aside." In the case above cited, the rule was to set aside the assessment of damages upon a writ of inquiry, etc.," words certainly not more explicit than those used in the rule before the Court, yet they were held sufficient. I am of opinion that the rule *nisi* to set aside the inquisition should be made absolute, with costs.

RIGBY, J.—I concur with the Chief Justice that the assessment of damages in this case should be set aside, on the ground of misdirection by the coroner. On the argument it was contended by plaintiff's counsel that, even if there was mis-direction, it could not be taken advantage of to set aside the assessment, as the direction of the coroner was in accordance with the law as agreed to and laid down by the counsel of both parties at the inquiry. But Mr. John A. McDonald, in his affidavit, states that Mr. Haliburton, in addressing the jury, referred to the 11th section of chapter 17 of the *Revised*

Statutes, and said to the jury: "That is the law, pure and simple." But that was not the law submitted to the jury by the coroner, for if he intended to instruct them in pursuance of that section he would have told them that they could find a verdict for the plaintiff for such sum only as they thought right and proper under all the circumstances of the case, unless they thought that defendant was guilty of *gross negligence;* whereas, what he really did tell them was something essentially different,—that if they came to the conclusion that defendant allowed Morrison to escape through "*any negligence* in taking the proper precautions to prevent such on his part, they were bound to find the full amount, or at least heavier damages."

EVANS *v.* THE CITY OF HALIFAX.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Estoppel.—Defendant precluded from taking advantage for want of plea.

In an action against the City for removing plaintiff's steps, it appeared in evidence that when the City Engineer called on plaintiff in reference to the alleged encroachment on the street, plaintiff asked the Engineer to give him the line of the street, whereupon the Engineer marked it on the corner of the steps with a pencil. Defendant's counsel contended that plaintiff was bound by this proceeding, under section 270 of the Act of Incorporation, and that, not having appealed under section 271, he was estopped.

Held, That the defendant could not take advantage of the estoppel, not having pleaded it.

This was an action brought by plaintiff against the City of Halifax to recover damages for the removal of certain steps erected by plaintiff for the purpose of obtaining access to his house. The defence relied on was that the steps removed were an obstruction, and interfered with the free use of the highway by the public. Plaintiff replied excess. The cause was tried before McDONALD, C. J., without a jury, who found a verdict for the plaintiff. A rule *nisi* was granted to set the verdict aside, and for a new trial.

Ritchie, Q. C., in support of rule.—The question is, whether a man can put his house wherever he likes, and resort to a law suit to settle the line. If so, it is a serious matter. There is a provision in the statute for settling

the line of the street. City Charter, p. 82, sec. 270. This statute applies to a platform, as in this case, because the effect is the same. It is an obstruction just as much as a building. The application must be made in every case, and it is a complete defence to this action, that plaintiff did not do so. (*Sedgewick, Q. C.*—There is no plea whatever setting up a defence under the statute.) If that proceeding had been taken there would be a record which would decide the line of the street for everybody. There is nothing settled by this proceeding. Hendry professes to fix the line of the street, but he did not go to the end, as he should have done, to get the proper point from which to extend the line.

Plaintiff proves that his steps were 3 feet 3 inches from the house. Hendry, his witness, says the line of the road was 2 feet 9 inches from the line of the house. There were, therefore, six inches of steps on the road which we had a right to remove.

There is no evidence to show that the pillars by which Hendry settled the line, were on the line of the street. Why did he not verify the position of the pillars, or run his line from the extreme points? (JAMES, J.—You had your surveyor, why did you not have him fix the line?) We would if there were an inquiry under the act. (MCDONALD, C. J.—If a party neglects to apply to have the line defined before building, he is liable to a penalty, but if you were to tear down his building you would do so at your peril.) There is no proof of title. (RIGBY, J.—The putting of the steps there was possession. That puts the burden upon you of showing your street.) The steps were not put in the same place as the former steps, but in a different place altogether.

Sedgewick, Q. C., contra.—The soil of the road to the middle of the street belongs to the owner, and a lot bounded on a street gives to the middle of the street. The only question is, whether the public have acquired an easement over it. The defendant here must show either a dedication of the road or such acts of user as raise an absolute presumption of a dedication. There is a presumption that the line of the street begins where the building stands, but there is no presumption that where there are steps extending from the

house, they are on the street. The presumption is all the other way. There is no evidence to show that the four feet of land east from the house was ever dedicated as a street, and the evidence is all the other way. *2 B. & P.*, 770, as to manhole not being a nuisance.

Ritchie, Q. C., in reply.—The act as to defining the streets which gives the Commissioners power to lay out the streets, is the Act of 1881, cap. 5. The city was incorporated and their act would not be valid without the authority of the City Council. In the city the parties own only to the end of their lots, and have nothing to do with the streets, as they have in England. There is no presumption of a grant to the owners. *Province Laws, vol. 2.*, 227, vests all the public property in the persons therein mentioned. (McDONALD, C. J.—I do not think that act refers to streets at all.) My argument is that previous to 1841 the soil of the city streets was in the city. By the Act of 1841 it was vested in Commissioners, and it is now vested in the city. (McDONALD, C. J.—Could a provincial statute divest the title of the Crown?) The City Charter obliges the party about to build to apply and get the line defined. It makes no difference whether the line has been previously defined or not. The contention of the other side is that if he has once built, he can go on building or pushing out his structure as far as he likes, without any fresh application. The evidence shews that the steps are actually on the line of the street.

JAMES, J., (November 9th, 1882,) delivered judgment, as follows:—

This is an action of trespass to land, tried before the Chief Justice, without a jury, which resulted in a verdict for the plaintiff, subject to a rule *nisi* for a new trial. The declaration was for taking away the platform and steps leading from plaintiff's house and shop to Gottingen Street. The pleas justified that the steps were on the public street, and an obstruction thereto, and a public nuisance. The question of fact at the trial was whether the steps were or were not within the line of Gottingen Street; and we are all of opinion that this question was, upon the evidence, rightly

found by the verdict in favor of the plaintiff. It was in evidence at the trial of the plaintiff's case that the City Clerk of Works came to the plaintiff, and insisted on his removing the steps, and afterwards gave him written notice that if he failed to remove them, they would be removed by the City, at his expense. The plaintiff went on to say in his evidence: "Mr. Keating, the City Engineer, also came to see me; he said the platform would have to come down; I asked him to give me the line of the street; * * * he marked it on the corner of the platform with a lead pencil." It was contended by defendant's counsel at the argument that this proceeding estopped plaintiff from denying the correctness of the line so pointed out to him, under section 270 of the Act of Incorporation, which requires parties intending to build to apply to the City authorities to fix the line of the street, and renders a party building over the line so fixed liable to a fine and the removal of the building, and that the plaintiff was bound by the decision of the City Engineer, inasmuch as he did not avail himself of an appeal from that decision under the provisions of section 271 of the Act. It is not necessary to specify the several objections to this contention, submitted to us at the argument, as we consider that if there is an estoppel against the plaintiff it should have been pleaded. It is clearly not an estoppel *in pais*. If estopped at all, it is by the record, which must be pleaded, and even if the City Engineer was duly authorized to fix the line, and if the pencil mark which he made was a sufficient record, from which plaintiff ought to have appealed, the defendant cannot take advantage of it, because he has not pleaded the estoppel.

The rule *nisi* to set aside the verdict must be discharged, with costs.

ROSS *v.* HARRINGTON.

Before McDONALD, C. J., and WEATHERBE and RIGBY, *JJ.*

(Decided November 9th, 1882.)

Joinder.—Payment made jointly, but from individual funds.

AN action was brought to recover $100 placed by plaintiff in the hands of the defendant for the purpose of betting on a boat race. The bet was made in the plaintiff's name, but the money was contributed by several parties in small sums, and although no arrangement was made, plaintiff stated in his evidence that the several parties were interested to their respective amounts, and if he had won they would have expected their money, and he would have been obliged to pay them. Plaintiff countermanded the bet before the defendant parted with the money, and there was no clear evidence to shew that defendant, as betting agent for plaintiff, had become bound before the bet was so countermanded.

Held, that the contributors could not sue jointly, but that plaintiff was entitled to recover back, not the whole amount, but only his own share of the money deposited, for which judgment must be entered in the Court below.

This was an action on the common counts, to recover a sum of money deposited in the hands of defendant for betting purposes. The cause was tried before the Judge of the County Court for District No. 1, who gave judgment in defendant's favor, from which plaintiff appealed. The evidence given at the trial was contradictory, but the facts proved were substantially as follows:—Defendant was authorized by Dr. Barker, of St. John, who acted for a third party, to make a bet of $100 on the result of the Smith-Ross boat race then about to take place on the River Thames, England. This fact having been communicated to plaintiff, the latter, acting for himself and several others, and for the purpose of making the bet referred to, deposited the sum of $100 in defendant's hands, who, thereupon, telegraphed as follows:—

HALIFAX, 20th November, 1880.

To DR. F. E. BARKER:

Have you put money up? Hundred dollars in my hands. Answer immediately.

A. E. HARRINGTON.

Some time having elapsed, and no answer having been received, defendant returned plaintiff the money deposited as above, and sent a second telegram, as follows:—

HALIFAX, N. S., 20th November, 1880.

To DR. F. E. BARKER:

As I did not hear from you, bet off.

A. E. HARRINGTON.

Shortly after this a report arrived that the race which was the subject of the bet had been decided, and, following this, defendant received and communicated to plaintiff a despatch in the terms following:—

ST. JOHN, N. B., 20th November, 1880.

To A. E. HARRINGTON, ESQ.:

Bet must be paid. It was fairly made under your telegram. My reply this morning sent before news wired. Better pay and look pleasant; if you don't, I must.

FRED. E. BARKER.

The reply referred to was a telegram, the delivery of which had been delayed, in answer to defendant's first despatch, informing him that the money had been put up. On the receipt of Dr. Barker's telegram, defendant applied to plaintiff to have the money returned to him, which was done, under circumstances as to which there was a conflict of testimony. The evidence on the part of plaintiff was that the report of the decision of the race had been discredited, and that the money was deposited the second time on the express understanding that, if the report was confirmed, the bet was to be drawn, and the money returned. Defendant denied that any such condition had been named, and swore that at the time the money was returned to him the news in confirmation of the first report had already arrived. Dr. Barker's telegram that the money had been put up in St. John was not correct, in point of fact.

The appeal was argued March 4th, 1882, by MacCoy, Q. C., and Motton, in support of the appeal, and Harrington, Q. C., and Weeks, *contra*.

MacCoy, Q. C., opened in support of appeal.

Weeks, contra.—Our contention is that, with a knowledge of all the facts, the plaintiff paid over the money to Harrington, who, in good faith, paid it over to the other parties to the bet. We do not care whether the money was put up in St. John or not, for the purposes of this argument. This case is very different from what it would be if the St. John parties were seeking to recover the money from Harrington.

RIGBY, J.—But plaintiff paid this money to defendant on the supposition that Harrington was liable to pay it to the St. John parties. Have you proved there was a bet? Was Harrington legally liable to pay the money?

Harrington, Q. C.—The defendant was not bound to plead that the contract was with the plaintiff and certain others. That was a fact that came out in the plaintiff's own case. The defendant took the ground on the motion for nonsuit. The evidence shewed clearly that the money sued for by the plaintiff was put up by several parties, in sums varying in amount. The plaintiff brings his action on a theory that he made a bet which became a drawn bet. If the news was true, he was to get his money back. If not true, and Smith won, he was to get his money back. There is no evidence that the bet was drawn. Ross denies that the money was paid in discharge of the original bet, and it is only on the theory that it was that he can claim to recover. My contention is that the money was paid on a completed bet. When the money was paid over to Harrington, he immediately telegraphed the fact to St. John, and asked if the money was up to cover it. The money was handed back before the reply was received, but when it was received the money was again paid to Harrington. Barker says he sent the telegram in usual course, and the moment he did so the contract was complete. The Judge has found that the telegram was sent in due course and in good faith, but that it was delayed. The telegram was sent before the result of the race in England was known. (WEATHERBE, J.—There is no evidence that there was an answer to the first telegram. The money was paid on Harrington's representation that he was bound. If he was not bound, it must be recovered back.) Ross should shew some authority to recover the money back.

MacCoy, Q. C., in reply.—Whether the bet is legal or illegal, either party may withdraw at any time before the money is paid and demand the money back, and if it is paid over after that, it is paid over of the defendant's own wrong. *Hasslaw* v. *Jackson*, 8 B. & C., 224. Telegraphing that the bet was off was a recission. Where the money is in the hands of the stakeholder, either party may countermand the

authority to pay it over. (McDONALD, C. J.—The question is whether Harrington was not an agent. WEATHERBE, J.—The question of stakeholder does not arise.) *L. R., 1 Q. B. D.*, 189; *L. R., 2 Exch. Div.*, 426. The defendant should have pleaded that there was a contract, and that the money was paid. *10 Exch.*, 737; *9 Q. B., N. S.*, 437. They should have set up the special contract on which the money was paid, and that it was determined, and we were bound by it. Harrington had no authority to procure any one in St. John to make a bet in St. John. The plaintiffs were instructed that their bet was with Dr. Barker, and that he put money up. Dr. Barker says the money was not actually put up, and that he did not bet himself, but made the bet with some one else. There was no responsibility on Harrington's part.

RIGBY, J., (November 9th, 1882,) delivered judgment, as follows:—

This was an appeal from a judgment for defendant in the County Court for this district. The action was upon the common counts, and was to recover a sum deposited by plaintiff with defendant, in connection with a race upon the Thames, which took place November 20th, 1880, known as the "Hop Bitters Race," in which one Smith, of Halifax, and Ross, of St. John, were competitors. The only plea was "never indebted." The plaintiff's evidence was to the effect that, on the morning of the race, he had placed $100 in defendant's hands, to be put up against a similar amount by a St. John man, plaintiff betting that Smith would beat Ross; that plaintiff having requested defendant to become responsible for the $100 to cover this sum, he refused to do so, until he had received an answer to a telegram he had sent to St. John, in consequence of which the money was returned to plaintiff; that shortly afterwards news was received that the race had been run, and that Smith was last; that defendant then stated that he had received a telegram from the St. John man, and that he held him responsible for the bet, and defendant wanted plaintiff to make a new bet, stating that the news concerning the race was not true; that defendant then went to the telegraph office, and asked them if they had received

any news; the young man in the office said they had not received any news. "Defendant and I made a fresh bet; I bet $100 on Smith, provided the news received of the race was not correct, and I placed $100 in defendant's hands as my stakes; if the news was true, it was to be a drawn bet, and I was to have my $100 returned. * * * We then went into the Union Telegraph Office, and I handed him $100, as I did not wish to give it him on the street; these were the only conditions; a quarter of an hour after the money was paid the first news was confirmed; I saw defendant the middle of the next week; had called previously; could not see him; the race was to be determined by the telegram; defendant was satisfied that Ross had won; I told him it was a drawn bet, and demanded my $100; he did not pay it, and said the St. John man was holding him responsible; that he would have to pay it; he said that he had not then handed it over; I demanded the bet two or three times after, and asked him if he considered it a bet; he said he did; that if the money had been bet at first, I would have lost; that we said we would not see him stuck, and he considered it a bet of honor; I said if he handed the bet over, I would recover it from him (defendant); the last time I called on him he said he had handed it over."

The Judge below has found that defendant must be considered as a betting agent for plaintiff, and although there may be no reason to disapprove of this conclusion, I can see no evidence to support his further finding that Dr. Barker, of St. John, with whom defendant was in communication, is also to be looked upon as the agent of plaintiff; the incorrectness of which finding is one of the grounds of appeal. The negotiations proved between plaintiff and defendant took place on the day of the race; those between the latter and Dr. Barker were by telegraph, and were commenced on the 19th, the day before the race. The earliest of the telegrams put in evidence was sent by defendant shortly after the money was first received by him from plaintiff, and is as follows:—

"Dated HALIFAX, 20th November, 1880.

To DR. F. E. BARKER:

Have you put money up? Hundred dollars in my hands. Answer immediately. A. E. HARRINGTON."

What money was referred to in this communication, or on what event it was to be "put up" could only be shewn by proof of the previous communication between the parties, and which could not have taken place in consequence of what had occurred between plaintiff and defendant. It is possible that if the telegrams had been produced, they might have established an arrangement between Barker and defendant, to the effect that if defendant would get $100 put up on Smith, Barker could get it covered in St. John, and which might, perhaps, be so connected with what had taken place between plaintiff and defendant as to furnish sufficient evidence to support the finding as to Barker's agency. The latter, in his evidence, referring to the correspondence between him and defendant, says that, *in consequence* of it, he "made in St. John a bet, with a gentleman there, of $100, he betting on Ross. *I, under the instructions I had received,* betting on Smith." We cannot, however, take this interpretation of that correspondence, and these instructions were not in evidence, and are not before us, and in their absence, it seems to me, there is nothing to support the finding in question. Defendant did not pay over the money to Barker until November 27th, and after plaintiff had demanded the money back; and the plaintiff having proved his money to have been received by defendant, the onus was upon the latter to shew that he had paid it over under some binding contract. The law on this subject is thus stated by Mr. Evans in his work on *Principal and Agent*, p. 327: "When a principal directs his agent to pay money over to a third party, the direction remains countermandable by the remitter until it is executed, either by the actual delivery of the chattel or the money to the remittee, or by some binding engagement entered into between the agent and remittee, which gives the latter a right of action against the agent." While it is possible that such a binding engagement may have been entered into, in my opinion it was not proved; and for this reason I think the plaintiff was entitled to judgment for the money received by the defendant to his use. I cannot concur in the contention of defendant's counsel that this should have been a joint action by all the contributors to the $100. Nor do I think plaintiff entitled to recover the whole of this sum. The following evidence of plaintiff bears

upon this point :—" * * McFatridge and Harrington called me ; McFatridge said Harrington had $100 to put up on the race ; ' do you want it ? ;' I said I did not want it myself, but that I could get it taken ; Harrington went with me to my shop ; some four or five parties were there, and we made up the $100 ; defendant and I went then to the telegraph office ; one of the parties went with us ; I placed the $100 in defendant's hands ; I made the bet in my own name." And on cross-examination he says :—" Defendant was putting up money for me ; of this $100, Orman put up $25, Inglis $25, Elliott $20 ; $70 put up by Orman, Inglis and Elliott at my store, to be put up against Ross ; I made the bet ; these parties gave the money ; defendant and I went to Fidler ; he put up $15 ; I told him that defendant had $100, to be put up on Ross ; I don't know who was making the bet with the St. John man ; I was betting with defendant ; can't swear he was betting with the St. John man ; the $70 was handed to me, by the parties in my store, to make the bet sure ; I made up the other $15 ; they were interested in the bet to their respective amounts ; my interest was $15 ; no arrangement was made, but if I had won they would have expected their money, as of course I would have been obliged to pay them ; all I would have won would have been $15 ; Fidler handed me $15 in the Union Telegraph Office." Defendant's evidence is substantially the same. He says :—" Was present when McFatridge sent for plaintiff ; he came ; McFatridge said to Ross : ' Harrington can get $100 on Ross in St. John ; will you take it ? ;' plaintiff said : ' Yes, I will ; I have not the money, but Harrington can come over to my shop, and I will get it there '; the money was put up as stated by the plaintiff ; they counted the money out ($70) and handed it to plaintiff, who said to me : ' Come along with me to Harry Fidler ; I know he will take the balance ;' met Fidler ; plaintiff said : ' There is a balance here of a bet against Ross in St. John ; will you take it ? ;' Fidler said : ' Yes ;' and was putting up the money, when Ross said : ' No, you take $15, and I will take the balance.' "

The case of *Osborne et al.* v. *Harper*, 5 East, 225, was an action of *assumpsit* for money paid, money lent, and advanced, &c., and arose out of the following facts :—The plaintiffs and

defendant having dissolved partnership, the defendant, after such dissolution, drew bills, in the partnership name, in favor of one Spencer, who did not know of the dissolution. The latter brought an action upon these bills against all the former partners. The defendant, in that action, pleaded his bankruptcy, and Spencer entered a *nolle prosequi* as to him, and recovered judgment against the other two, which was afterwards satisfied by their attorney, and they then brought the action to recover the amount from the defendant. The verdict was for the plaintiffs, and on the argument of a rule for a new trial, on the ground that plaintiffs could not maintain a joint action, the Court at first expressed great doubts upon the question, but "Lord ELLENBOROUGH, C. J., at last observed upon the evidence given by the attorney of the plaintiff that he had discharged the whole demand at the request of the present plaintiff, which, he said, seemed to convey the idea that the plaintiffs had borrowed the money jointly of their attorney for the purpose of paying the damages, and then it might be considered as a joint payment by them, out of which a joint cause of action would accrue. But if each of the plaintiffs contributed his share of the money put into the attorney's hands for the purpose of satisfying the damages, that would not constitute a joint demand against the defendant but each must sue separately for his particular advance. The Court, therefore, finally directed that the plaintiffs' attorney should make an affidavit stating particularly in what manner the money paid by him had been obtained; whether he had paid it out of his own pocket, upon the joint credit of the plaintiffs, making them jointly liable to him for the whole; *or whether each of the plaintiffs had in the first instance contributed so much of their own money, with which he had afterwards made the payment.* And they observed that it was necessary to have the fact stated with more precision than it appeared upon the report, as the case would furnish a material precedent in future. On a subsequent day in the term the affidavit required was produced, stating that the plaintiffs' attorney had advanced £500 on the joint credit of the plaintiffs, and had borrowed the remainder upon their joint note, with which he had discharged the execution. Lord ELLENBOROUGH then

said that that created a *joint* fund for the discharge of the execution, and consequently the plaintiffs were entitled to maintain a joint action for the re-payment of the money so advanced."

This case has been recognised as an authority in the United States and in the case of *Doremus* v. *Seden*, 19 Johnson, SPENCER, C. J., says, at p. 207: "It appears to me that the principle advanced in *Osborne et al.* v. *Harper*, is the true one, that to enable several persons to join in demanding the re-payment of a sum of money, it ought to have been paid out of a joint fund. Here the plaintiffs contributed to the payment separately, and in unequal parts, without any community of interest in the money paid, and therefore they cannot maintain a joint suit." In *Dicey on Parties to Actions*, at page 120, in the notes, the rule is thus stated: "Where payment is made by several from a joint fund, they must join in a suit for re-imbursement, *but if the payment, though jointly made, was from individual funds*, the rule will be otherwise.

As the $100 in question in this suit was not paid out of a joint fund, I think plaintiff is only entitled to recover the sum of $15, which he contributed as his share, and as there is no plea to the jurisdiction, I am of opinion, following the judgment of this Court in the case of *Sharp* v. *Maxner*, lately decided, that he should have judgment for that amount in the Court below, with costs, and that the judgment appealed from should be set aside, with costs.

McDONALD, C. J., and WEATHERBE, J., concurred.

GASTONGUAY ET AL. v. SOVEREIGN FIRE INS. CO.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Over-valuation in Proofs of Loss.

UNDER conditions, in a policy of fire insurance for $400, requiring that in claiming for a loss the whole actual cash value of the property insured should be declared, and providing that any fraud or false swearing should vitiate the claim, defendants pleaded that plaintiff delivered a false and fraudulent account of the alleged loss, and that defendant had declared the building destroyed to be worth $600, to induce the defendants to pay him $400, whereas the building was not of that value, and plaintiff had not suffered damage to that extent, as the insured well knew.

Held, that the defence was sufficiently pleaded.

This was an action on a fire insurance policy issued by the defendant company to one Alexander LeBlanc, the loss, if any, under which was payable to the plaintiffs. The amount insured was $400, and the subject a two-story frame dwelling house. The grounds chiefly relied upon by the defendants were fraudulent over-valuation, and misrepresentation as to interest. The cause was tried before McDONALD, J., without a jury. Plaintiff's evidence was that the house was worth $600, and had cost him $400. Three witnesses called on behalf of the defendant company described the building as a one-story house, built on blocks, partly finished, and worth from $100 to $120. Judgment was given for the defendants, and a rule granted to set the same aside, as against law and evidence, and for the improper reception and rejection of evidence.

The twelfth condition of the policy required the party claiming for a loss, among other things, to "declare what was the whole actual cash value of the property insured," &c. The fourteenth condition provided that any fraud or false swearing in relation to any of the particulars should vitiate the claim.

Defendants' ninth plea was as follows:—

9. And for a ninth plea to said count, defendants say that after the alleged loss and damage, the said Alexander

LeBlanc, by whom the proofs of loss were required to be made in accordance with a condition in that behalf endorsed on said policy, made and delivered to the defendants a false and fraudulent account and statutory declaration of the alleged loss and damage, as and for such account and statutory declaration as is mentioned in said condition in that behalf endorsed on the said policy, in which account and statutory declaration he represented and attested that the dwelling house and kitchen of the said Alexander LeBlanc, to the value of over $600, had been burnt and destroyed by the said fire, and that his loss and damage by the said fire in respect thereof were to that amount, with interest, to induce the defendants to pay the plaintiff the said amount of four hundred dollars, whereas the said dwelling and kitchen of said Alexander LeBlanc had not been burnt or destroyed by said fire to the amount of over six hundred dollars, and his said loss and damage were not to that amount, as the said Alexander LeBlanc well knew.

Lenoir, in support of rule.—The question of over-valuation can only arise on a valued policy. *2 N. S. Decisions*, 40.

MacCoy, Q. C., (with Lenoir).—The pleas do not properly raise the question of fraudulent over-valuation. *Steeves* v. *Sov. Fire Ins. Co.*, 4 Pug. & Bur., 394. You must set out the circumstances, and allege that they were material. (RIGBY, J. —The value of the property, as a matter of course, must be material in this case. MCDONALD, C. J.—You are asking us to set aside a finding that is amply sustained by the evidence. It is evident that the property was not worth anything like what the insured swore it was. RIGBY, J.—If the insured had been found guilty of perjury on this evidence, the finding could not be set aside.) In *1 R. & C.*, 240, it was held that the plea must allege that the statement was wilfully false. (RIGBY, J.—That means fraudulently false. The amount may be only ten dollars, but if the statement is fraudulent it is enough.) The form of plea I contend for is given in *Chitty on Pleadings*, 414. You must allege that the fraud is wilful. (MCDONALD, C. J.—You are forgetting all through that a man cannot do a fraudulent act without doing it wilfully. I have little doubt myself but we will look at your cases.)

RIGBY, J., (November 9th, 1882,) delivered the judgment of the Court:—

We are all of opinion that the finding of the learned Judge who tried this cause should not be disturbed. There was sufficient evidence of fraud and false swearing to vitiate plaintiff's claim under the provisions of Conditions 12 and 14 of the policy, which defence, we think, was sufficiently raised by the 9th plea.

McKENZIE *v.* OLDING.

(Before McDONALD, C. J., and JAMES and RIGBY, JJ.)

(Decided November 9th, 1882.)

Execution to take the Body for Want of Goods.—Plea.—Statutory replication.

To an action for assault and false imprisonment defendant pleaded, justifying the arrest under an execution issued by a Stipendiary Magistrate, and pleaded specially that execution had been issued, commanding him to levy for the amount from off the goods and chattels of the debtor, and for want of goods to take the body; "and the plaintiff herein not having any goods or chattels to satisfy the same, the defendant herein, as and being such constable as aforesaid, by virtue of the said writ, committed the plaintiff," &c.

Held, that the statutory replication enabled the plaintiff to avail himself of the ground that he had goods whereon the constable could have levied.

This was an action for an assault in arresting plaintiff, and imprisoning him in the common gaol. Defendant pleaded in denial, and then as follows:—

3. And for a third plea, in answer to both counts of the plaintiff's declaration, the defendant says that at the time the several acts complained of were committed the defendant was a constable for the County of Pictou, and keeper of the jail at New Glasgow. That one Duncan R. Cummings obtained judgment against the plaintiff herein before John McKay, Esquire, one of Her Majesty's Justices of the Peace for the County of Pictou, and Stipendiary Magistrate for the Town of New Glasgow, he having jurisdiction in the premises, on the twenty-seventh day of April, A. D., 1880. That afterwards an execution issued thereon against the plaintiff herein, which was given to the defendant as such constable, to be forthwith executed; and he, in obedience to the said execution, and not otherwise, arrested the plaintiff herein, under and by

virtue of the said execution, which are the trespasses and grievances complained of.

4. And for a fourth plea to both the counts of the plaintiff's declaration the defendant says that before any of the alleged trespasses, (on the twenty-seventh day of April, A. D. 1880, aforesaid) an execution was issued against the plaintiff herein, at the suit of Duncan R. Cummings, aforesaid, by the said John McKay, Justice, as aforesaid directed to any of the constables of the County of Pictou, and which was given to the plaintiff herein, he being a constable in the said county, commanding him to levy from off the goods and chattels of the plaintiff herein the sum of ——— dollars, and for want thereof to take the plaintiff herein, and commit him to Her Majesty's jail in New Glasgow; and the plaintiff herein, not having any goods or chattels to satisfy the same, the defendant herein, as and being such constable as aforesaid by virtue of the said writ, committed the plaintiff to Her Majesty's jail at New Glasgow, which are the alleged trespasses.

5. And for a fifth plea the defendant says that the alleged trespasses and grievances, if any, were committed by the defendant in the execution of his office as constable, under and by virtue of an execution issued by John McKay, Esquire, a Justice of the Peace for the County of Pictou, and Stipendiary Magistrate for the Town of New Glasgow, he having jurisdiction to issue the same after the passing of the statute entitled, "Of the Protection of Constables," chapter 112 *Revised Statutes*, (4th Series), and no demand in writing, as required by the first section of the said section 112, was either served upon the defendant or left at his usual place of abode for the space of six days previous to bringing the action herein, as by said statute required.

The cause was tried at Pictou, before WEATHERBE, J., and a jury. Plaintiff swore that he had property enough to have satisfied the debt, and that he could have got the money by going to Pictou, where he lived. The evidence on the part of the defendant was that the reason given by plaintiff for wishing to go to Pictou was to perfect an appeal from the judgment on which he was arrested; and further, that plaintiff made no offer of property to satisfy the execution

The jury, under the directions of the learned Judge, found a verdict for the defendant. A rule to set the verdict aside having been refused, a rule was taken under the statute.

Henry, Q. C., in support of rule, cites *1 Hannay's N. B. Reports*, 162. This case was decided under the New Brunswick statute, (which is not so explicit as our own,) which is clear that the body is only to be taken for want of goods.

(McDONALD, C. J.—If there is no legal power of arrest until the goods are exhausted, would not the plea that the arrest was made by virtue of the execution be sufficient in the absence of a replication ?)

Ross, contra.—The third plea required a replication.

(McDONALD, C. J.—The objection was not taken at the trial. If it had been, it might have been amended.)

The constable is justified, under certain circumstances, in arresting under the execution.

(McDONALD, C. J.—When he is challenged he must shew that he was justified in proceeding as he did. We must presume everything in favor of a man's liberty. He is not to be picked up in the street for five shillings when he has plenty of property.)

The plaintiff did not tell the constable he had property.

(RIGBY, J.—It might have been better if he had told the constable, but the constable should shew that he did not know the plaintiff had property.)

The plaintiff misled the constable by saying nothing about the goods, and merely claiming that he wanted an appeal. In *Sandon* v. *James*, El., Bl. & El., 935, the constable had no right to break the door, and it was so replied. Here there was no right to arrest except in the absence of goods. See also *3 H. & N.*, 757.

(McDONALD, C. J.—You justify under an execution. When it is produced it is found that the right to arrest is contingent on another event, which had not happened. Must that be replied ?)

Most certainly. They go on the principle that we are wrong-doers, and must prove everything to make us such.

Henry, Q. C.—I have been unable to find anything to establish the necessity of a replication in a case like this. It is a question of fact, under the third plea, whether the defendant arrested the plaintiff under the execution. Admitting defendant had an execution, there is no proof whether he arrested independent of it or not.

McDONALD, C. J., (November 9th, 1882,) delivered judgment, as follows:—

This was an action for assault and false imprisonment. The defendant pleaded denial and justification under execution issued by the Stipendiary Magistrate at New Glasgow, on a judgment entered before him. The execution is in the form given in chapter 91, *Revised Statutes*, (4th Series). The third plea recites the judgment generally, and alleges that he arrested the plaintiff "under and by virtue of the said execution." In the fourth plea the defendant, alleging himself to be a constable, recites the judgment, and that the execution on such judgment was given to him, as such constable, and he was therein commanded "to levy from off the goods and chattels of the plaintiff herein the sum of ——— dollars, and *for want thereof to take the plaintiff* therein, and commit him to Her Majesty's jail in New Glasgow, *and the plaintiff herein not having any goods or chattels to satisfy the same*, the defendant herein, as and being such constable, as aforesaid, by *virtue of the said writ*, committed the plaintiff," &c. The execution was put in evidence and relied on as a justification. It was objected at the argument that the plaintiff must fail for want of replication to these pleas. I could not then see, nor can I understand now, after giving the case the best consideration in my power, what new issue the plaintiff could submit by a replication which is not raised by the statutory reply to the pleas on file. The defendant alleges that he imprisoned the plaintiff under and by virtue of a legal writ regularly issued, which justified him in such imprisonment, and he further alleges in justification that he so imprisoned the plaintiff because he, (the plaintiff,) "had not any goods and chattels to satisfy the execution." The plaintiff, by virtue of our statute, denies these allegations, and raises the two issues:

1. That the defendant had no legal writ by virtue of which he was, at the time of the arrest, authorized or empowered to imprison the plaintiff.

2. That he, (the plaintiff,) had goods and chattels sufficient to satisfy the execution.

The execution was for a trifling sum, and on the trial the plaintiff gave uncontradicted evidence of the ownership and possession of goods and chattels more than sufficient to satisfy the writ.

Hunter v. *Maddox*, 1 Hannay's Reports, 162, was an action almost identical with the present one, in principle as well as in the facts of the case and the pleadings in the cause. In that case the then Chief Justice of New Brunswick, now Chief Justice of Canada, thus stated the law:—"Under an execution such as this, we think it was the duty of the constable to endeavour, by the use of reasonable diligence, to find goods and chattels of the defendant to levy on and, having failed to discover property, *and having reasonable grounds for believing* that the defendant had not goods and chattels within his parish, then, *but not till then*, has he authority to take the body." This is also the law in this Province. In this case it is not pretended that the defendant made any effort to find property; indeed, so far as is indicated by the evidence, the defendant never asked the plaintiff, previous to the arrest, whether he owned or would point out goods and chattels to satisfy the execution. And whether the defendant believed or had reasonable grounds for believing that the plaintiff had not such goods and chattels were questions that should have been submitted to the jury. "Where a party arrests and imprisons another, and is sued for so doing, he must plead such matter, as the burthen is on him, to shew that he was justified in doing so." Under an execution such as this defendant could only arrest in the event of failing to find goods whereon to levy. The burden was on him to shew, after reasonable effort and search, that the contingency had arisen which authorized him to arrest the plaintiff. This, I think, he has failed to do. I also think that the learned Judge should have left to the jury the question whether the defendant had made reasonable effort to discover goods or chattels on which to levy, and whether he had reasonable

grounds for believing that such could not be found. The result is that the verdict must be set aside, with costs.

RIGBY, J., concurred.

JAMES, J.—The defendant justifies that the plaintiff not having any goods or chattels to satisfy the execution, the defendant, in performance of his duty as a constable, committed the plaintiff to jail. Under this issue the plaintiff was bound, not only as the affirming party, but as the only party who would be likely to know the facts, to prove that at the time of his arrest he had goods and chattels to satisfy the amount, and he gave, at the trial, slight evidence to that effect; sufficient, in my opinion, to go to the jury.

Let us look at the facts. The defendant is sued, judgment given against him, and execution issued at New Glasgow, twelve or fourteen miles from his home at Pictou. The defendant being at New Glasgow, the constable went to him with the execution. He asked for time to appeal; said he could get security. His own evidence is: "I said I could get bonds or goods, or the money if necessary." And in answer to the Court, he stated that his meaning was that he was able to procure security, that is, to effect the appeal. Although he said at the trial that he had goods at Pictou, he did not tell the defendant so. He did not offer to produce any goods, either on the spot or at Pictou. It is beyond all question that all the delay he asked for was, not to pay the amount or turn out goods, but to perfect an appeal. If he had goods available to satisfy the debt, he did not disclose the fact. Perhaps he had a legal right to refuse or neglect to do so, but it is a fact that he did not. On the other hand, it is clear that the defendant did not ask him if he had any goods before arresting him.

The circumstances are different in *Hunter* v. *Maddox*, 1 Hannay, 164. There the plaintiff wanted the defendant to go to his father's, ten miles distant, and levy on a horse. The defendant replied that if the plaintiff would go with him and point out the horse, he (the defendant) would go, but the plaintiff refused; and in addition the plaintiff "pointed out a waggon which was standing near the door, and in which he

had come to court that day, and told him to levy on that," but the defendant refused, and put the plaintiff in jail. In the case before us, the defendant did not, it is true, ask him if he had goods, and the plaintiff did not say he had goods. In *Hunter* v. *Maddox*, the Chief Justice says :—" In this case plaintiff having pointed out a waggon as his property, the defendant should have levied on it, unless he believed, or had reasonable grounds for believing, that the waggon was not the plaintiff's property. Whether he did so believe or had such reasonable grounds were questions that should have been submitted to the jury. In this case the defendant appears rather to have disputed the fact of the waggon having been offered to him than that it was the plaintiff's. There was contradictory evidence on this point which should have been put to the jury." Here no property was tendered, and there is no contradictory evidence to put to the jury. That case therefore, is not, in my opinion, decisive of this case. I cannot help thinking that if this case ought to have gone to the jury it could have been only on the question of "goods or no goods." And as there was evidence given for the plaintiff on this issue, I must sustain the conclusion at which the learned Chief Justice has arrived. But surely there ought to be some plea in this action of trespass under which the defendant could have shewn, as in an action for malicious prosecution, that he had "probable cause to believe" that there were no goods, nor am I satisfied that a plea to that effect could not have rightly been pleaded. If it could have been, and had been pleaded here, the verdict for the defendant must have been sustained on the evidence before us, and the Judge would have rightly charged the jury to that effect. I do not, however, express an opinion that such a plea would have been valid, nor do I express any opinion whether the constable rendered himself liable by not calling on the plaintiff to expose goods before arresting him. But I think it unreasonable to suppose that a party against whom an execution has issued can refuse, if he has goods, to state the fact to the officer, or fail to do all in his power to put the officer in possession of them, and at the same time retain his liberty and the opportunity of making his escape while the sheriff is searching the county to find goods whereon to levy.

The Supreme Court execution, which is peculiar in its form, does not derive its force from any statute of the Province, but from the orders by Her Majesty's Council, passed before we had a legislature. I have never seen the compilation but once, and it is not in our public libraries. It directs the sheriff, out "of the goods and chattels, lands or tenements of the (defendant) within your precinct, you cause to be paid and satisfied, &c., and for want of goods, chattels, lands or tenements of the said (defendant), *to be by him shewn unto you, or found within your precinct,* to the acceptance of the said (plaintiff) the sums aforesaid, we command you to take the body," &c. The execution from the justice of the Peace under which the plaintiff was arrested (with other differences) omits the words *to be by him shewn unto you or found within your precinct.* I presume that under a Supreme Court execution it would be a good plea in an action like the present that "the execution defendant did not expose any goods, and that the officer had no knowledge of any, nor any opportunity to levy." But would such a plea suffice under the justices' execution? I mention these questions because it is of the utmost importance that officers who are required to execute Her Majesty's writs should be efficiently protected in the discharge of their duty and should have plain and clear directions to guide them. At present the law is in a very unsatisfactory position, and if public officers are to be expected to act under it until it is made clear by a series of judicial decisions they will be exposed to continued litigation, of which this suit is but the beginning, and no sensible, prudent men can be expected to accept of these offices.

DWYER *v.* GASPER.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1883.)

Verdict set aside on the evidence.

In an action for damages to plaintiff's mill property and privilege by a dam erected lower down the stream and the diversion of a brook in such a manner as to raise the surface of the water in the pool below plaintiff's mill and so interfere with the working of his mill wheel, the jury found for the defendant. The Judge who tried the cause, after a lengthy analysis of the evidence, concluded that there was not a single material fact in the case in favor of plaintiff which was not conclusively shown by the witnesses for the defence.

Held, that the verdict must be set aside.

Per RIGBY, J., that the conclusion arrived at by the jury was not a conclusion at which reasonable men ought to have arrived on the evidence before them, and that they had decided the issues submitted to them without giving sufficient weight to the uncontradicted testimony in favor of plaintiff.

This was an action on the case for the erection of a dam, whereby the waters of a stream, to the flow of which plaintiff claimed to be entitled, were prevented from running in their ordinary course, and were backed up in such a a manner as to prevent plaintiff, at various times, from working his mill. The declaration also contained a count for the diversion of the waters of a brook into the mill stream, whereby the waters in the stream were increased and backed up as in the preceding count. Defendant pleaded in denial, and also pleaded an estoppel by a judgment in his favor in a previous suit for the same cause of action between the same parties.

The cause was tried at Port Hood, in July, 1880, before Mr. Justice JAMES, with a jury, and a verdict found for the defendant. A rule *nisi* was taken out under the statute on the usual grounds.

Attorney-General, in support of the rule.—The evidence shews clearly possession and user by the plaintiff for seventeen years. It shews clearly, too, that plaintiff's mill has been rendered useless by the raising of the defendant's dam. The raising of that dam some fourteen inches has been clearly proved. The evidence of Alexander McDonald, as to the levels of water, &c., was improperly rejected. We have strong ground here for contending that there is no evidence whatever to

meet the evidence of plaintiff's injury, and of one cause of it being the defendant's dam.

JAMES, J., says he was dissatisfied with the verdict, and only refused a rule because it was a second trial, and he wished to save plaintiff costs of protracted litigation.

Ritchie, Q. C., contra.—Plaintiff's declaration does not contain a count sufficient to cover the damage attempted to be proved here. The evidence shews that plaintiff penned the water up over night at his own dam, and that, when an extraordinary flow was turned on in the morning, and only then, our dam caused backwater. There is no evidence to shew that we cause a backwater during the "ordinary flow," which is all plaintiff's declaration claims.

The mill here is not an ancient mill, and plaintiff is only entitled to the natural flow of the stream. There is a great deal of contradictory evidence here on material points. There is evidence given by one of plaintiff's witnesses of thirty-two inches' difference in level between the surface of defendant's still water and the sill of plaintiff's mill. That was when the water was at the highest, running over defendant's dam. There is uncontradicted evidence of obstructions in plaintiff's mill-race, above defendant's backwater, and the jury may be presumed to have found for defendant on that. The rule *nisi* here is open to another objection in not setting out the grounds specifically.

Attorney-General, in reply.—The rule sets out the ground "that the verdict was against the weight of evidence," which is as specific as it could be put. *Fisher's Dig.*, 6115; *14 U. C. C. P.*, 345. There is evidence that other causes might have produced the obstructions in question, but none to show that the obstruction was in no degree caused by defendant's dam. There is evidence shewing that the obstructions in plaintiff's race were caused by the defendant's backwater making the current in the race slower than it would otherwise have been.

JAMES, J., (November, 9th, 1882,) delivered judgment as follows:—

This is an action for obstruction to a water course, whereby defendant, by erecting a dam below the plaintiff's mill, and

changing the course of a brook, called Shea's Brook, raised the level of the water so as to obstruct the working of the plaintiff's mill, situate at Brook Village, in the County of Inverness. The cause was tried at Port Hood, in July Term, 1880, before myself and a jury, and a verdict given for defendant, contrary to my opinion expressed in charging the jury. Two issues were given to the jury, which, with their answers, are as follow :—

Making allowance for any defect in plaintiff's arrangement about his mill, which might tend to create or increase backwater, are you of opinion that the defendant's mill-dam, the increase in the gravel bank formed by Shea's Brook, and and the stones alleged to have been deposited by defendant, jointly, or any of these causes separately or together, caused any backwater or increase of backwater at plaintiff's mill which would not have occurred had these alleged obstructions not existed ?

Eight no's ; one yes.

Did you find that the lower edge or bottom of plaintiff's wheel when he built his new mill was 14 or 16 inches higher than the bottom of the old wheel ?

Yes ; nine believe it was raised 14 inches.

(Sgd.) MICHAEL MCEACHERN, Foreman.

A general verdict was thereupon entered for the defendant, and the case was argued before us on a rule *nisi* to set the verdict aside, and grant a new trial. This rule was taken under the statute, as I refused to grant a rule, under the mistaken belief that this was a second verdict for the defendant in this matter, but I afterwards discovered that the former verdict had been in another suit, in which the issue was materially different.

The stream on which the two mills are situate is a large brook, running through intervale land. The distance from plaintiff's mill to defendant's dam is about 28 rods ; the stream widening very much after it leaves plaintiff's mill and until it reaches defendant's pond and dam. There are no rocks or other natural impediments to prevent it from keeping

its own channel clear unless obstructed in some way by artificial means, the difference of level in those 28 rods being only some two feet, as will appear hereafter. In such a brook, when not interfered with, gravel and sand are continually washing down and being deposited in little bars or beaches, with pools between them, and rapids where the stream, narrowed by these beaches, runs past them. If a permanent obstruction occurs from any natural causes, for instance, a "jam" or "pack" of drift wood, the river makes a course for itself around the obstruction, unless prevented by some rock formation; but while the obstruction exists, the water is raised to a considerable distance above, and the still water thus created forms a receptacle for the sand and gravel continually brought down in time of freshet from above. These remarks, although simple and common-place, and characteristic of all streams running through alluvial lands, from the Mississippi River to the smallest brook, are necessary to be mentioned here, because they were not understood or remembered by the jury who tried this cause, or they could not have found a verdict for the defendant.

The two mills of the plaintiff and defendant are about 1800 feet apart. They were both erected at the same time, and commenced working about the same day in May, 1875. But the plaintiff's mill was erected on the site of a former mill, which he built in 1857–8, and operated with more or less success until 1874, some 16 years, during which he had the stream all to himself. The defendant owned property further down the stream, where his mill and dam were afterwards erected. Of his mill the plaintiff says in his evidence: "I had a good flow of water then; my mill was for many years considered the best mill in the county; had no backwater then except in very heavy freshets, when I would be idle not more than a day or two; had no trouble with dead water for six or seven years; then some sticks caught across where Gasper's mill now is, and slabs and dust from my mill accumulated where the sticks had caught; I asked Gasper to let me go and clear out the jam, or I would pay him to do it; he took out some, and I paid him for it, and I cut some; this occurred two or three times along about 1867-8; after

removing it the mill would work better; we would clear so little in a day or two that it would fill right up again; In 1871 I made a particular bargain for him to take the jam all out, and I would give him my mill for one year for half the lumber he would saw; he sawed logs on the halves. and was to give me one-half of his share; he had the mill that year, and cleared out the jam, under that agreement."

This evidence is not attempted to be denied by the defendant. He admits the agreement, and says he had the mill under it for two years, but that he cleared out the jam before he commenced running the mill, after which she "ran pretty well; whenever there was sawing water there was no trouble; in any freshet that could be called a freshet she would be idle from one day to six." Of the jam he says: "It was a chain at least above my present dam; * * * the slabs, old brush, sawdust, etc., was six feet above the intervale at least; could go across it the highest freshet; the water made its way through it; it would keep the water back; when the water was high the stuff on top would rise, and in high water some of the water would run off at the sides over the intervale; *it made a gully round at the east side*, the side my mill is; it made the brook as wide again as it was; on that about a chain below I put my mill."

It is perfectly clear, from these concurring statements of the plaintiff and defendant, that the jam, while it existed, caused the obstruction of plaintiff's mill. In place of this jam, which defendant had removed under contract with plaintiff in order to remove the obstruction to the plaintiff's wheel, the defendant erected a dam 4½ feet high. He says: "I built it 4½ feet from the bottom of the brook; the side dam is somewhat higher than the intervale, to keep the water from going over on that side; * * * it is about that height now." The jam was loose, and the water ran through it, thus diminishing the frequency of the water rising to the height of the intervale. When the jam was there, the water ran over the intervale in freshets, and found further relief by gullying a new course for itself around the jam. On the other hand, the dam was a tight structure, and was built higher than the intervale, to keep the stream confined, and prevent

it getting relief by spreading over the level land, or cutting a new channel. The jam was admittedly an obstruction to plaintiff's mill; could the dam have been less of an obstruction? There was some discrepancy of evidence as to the height of the dam from the bottom of the brook, which I consider of little consequence. What we want most to know is, not the depth of the bottom of the brook, but the height of the dam in relation to plaintiff's wheel and to the surface of the intervale. I adopt defendant's statement as to the height of the dam. Whatever its height, it is evident that defendant sought and obtained the utmost possible control over the water, irrespective of any right of the plaintiff, by erecting a high and water-tight dam. No evidence is given that he at any time diminished this control for an hour to relieve the plaintiff's mill. I think that upon this evidence alone the plaintiff ought to have a verdict. But there is a great deal more than this in the case. The plaintiff and defendant were both engaged, in 1874-5, in erecting their mills, the plaintiff's old mill having become decayed. The plaintiff's new mill was much more expensive and efficient than the old one. It cost him $2,000, besides $600 paid by him for the privilege of flooding a quantity of land about his mill. The old and new mills were both undershot, but the new one had a wheel 20 feet in diameter, against a wheel 2 feet 9 inches in diameter in the old mill. But the most material difference between the two mills, the old and the new, as regards this suit, was that the bottom of the new wheel was made 14 inches higher than the old one. The plaintiff was constructing an expensive mill. He had acquired a right to use the water at the lower level, but in order to obviate all possible risk of backwater, he gave up this right, preferring to sacrifice a material amount of water power in order to prevent entirely the risk of being injured by the dam his neighbor was constructing below him. This very material and significant fact, the raising of the wheel, was attempted to be controverted by the last witness called for the defence, who spoke very positively from his own observation; but he was contradicted by the architect who built the mill, and who happened to be in Court, and the jury have, on a special issue, found that fact for the plaintiff.

If the plaintiff had a right to expect to be able to run his mill at the lower level, how is it that he could not do so at the higher level? The defendant's water-tight dam in part accounts for it, but not wholly. There is another very material fact, which did not come into question at the former trial between the parties—a trial in a suit which had terminated before this suit was commenced.

Before the erection of defendant's dam there was a brook flowing through the intervale from the northward, and discharging itself into the main brook below the defendant's dam. This brook was sufficiently large to turn a mill during a part of the year, (some six months,) and the defendant at one time spoke of placing his mill on it instead of the main brook. After he had built his dam, in order to increase his water power, he diverted this brook into the main brook, above his dam, and at almost one-third of the distance from his mill towards the plaintiff's mill. This was a year or two after he finished his dam, and from the time of this alteration the obstruction of plaintiff's mill from backwater increased rapidly, and became very serious. The reason is, I think, obvious. The water from Shea's Brook brought down earth, sand and gravel, and deposited them opposite the mouth of the brook in defendant's pond. Before the alteration in the brook it was about forty feet wide at that point, but the accumulation of sand, etc., formed a bank there in the brook, which was as high as the intervale, and which diminished the width of the brook at the surface of defendant's pond, at low water, from forty feet to nineteen feet, according to the witnesses for the defence, including the defendant himself, and of course diminishing the depth in the part still left open. Had the defendant's dam not been there, the force of the water in freshets would have carried this material down stream; but as it fell into the still water formed by defendant's dam, it settled and accumulated there, forming an additional obstruction. This is abundantly evident from the evidence of the witnesses on both sides. This alteration, therefore, acted as an increase to the defendant's obstruction, first by raising the height of water on defendant's rolling way in a freshet by increasing the quantity, and, secondly, by obstructing

and backing up the water before it got to defendant's dam. It is certain that this alteration must in both these ways have injured the plaintiff. It is evident from the defendant's own evidence and that of every witness who spoke of it, and which is too voluminous to be introduced here. Difference of opinion there was on the part of some witnesses on various points, but scarcely any on questions of fact. Instead of extracting the evidence of the twelve witnesses on this point, it is sufficient to say that the evidence on this and the other points I have referred to is, as to the material facts, singularly harmonious, and the more I have studied it the more I am satisfied that the verdict on these grounds, (and these grounds were what were mainly presented in the charge to the jury,) ought to have been for the plaintiff. But there is another branch of the evidence founded on the proved water levels, which I did not enlarge on to the jury, partly because I thought them better qualified to decide the case upon practical than upon scientific grounds, partly because I thought the plaintiff's evidence, supported as it was on every main fact by the defendant's witnesses, was sufficient to protect him, and partly because I could not, at the trial, give it the requisite consideration. I have since had opportunity to consider it very carefully, and I find that it is entirely conclusive in favor of the plaintiff. The distance from the defendant's mill to the plaintiff's, by the plan before me, which is proved to be accurate, is about 1848 feet. The place was examined by Mr. Murphy, the surveyor, in presence of the plaintiff, the defendant, and his son, and several other witnesses, in October, 1877. The time chosen for the survey was most favorable. The water was low, running over defendant's dam, but not over plaintiff's dam. The level water of the defendant's pond was found to extend from his dam to a point 1320 feet up stream, and within 528 feet of plaintiff's dam, as nearly as it is possible to ascertain by the plan. From this to defendant's dam was still water, and, of course, perfectly level. This fact is very material. From that point to the sill of plaintiff's mill he found a difference of level of 32 inches. He did not take, or did not state, the level to the bottom of plaintiff's wheel, which was an important omission; but all the witnesses concur in stating that the wheel was several

inches below the sill of the mill. Some of them stated it at 24 inches, and some at 26 inches above the water level; within these limits, all the witnesses, some of them present at the survey, are agreed. I take it at 25 inches. Now it is evident that if, from any cause, the water was raised 25 inches in defendant's rolling way, and no water coming in from above, the still water would, if arrested in that condition, extend from the defendant's dam to the bottom of plaintiff's wheel, and to a height of 14 inches on the old wheel, had it remained there. This water level would be, for the purposes of this argument, equivalent to a marble floor, at the same level, because two cubic feet of water can no more be put in one cubic foot of space than if the material were marble instead of water. From this it follows that when, in freshets, the water was running two feet deep over defendant's dam, (and we have evidence of its running three feet,) the whole difference of level between the two points would be occupied by water artificially raised by defendant, independently of the water coming down from above. But the water coming from above would be equal, (or nearly so, allowance being made for Shea's Brook,) to that going over defendant's dam; and if there were a level marble floor, as I have supposed, from the bottom of the wheel downwards, the water escaping through plaintiff's mill, or over his dam—it is no matter which—must flow over this, and run down in an inclined plane to and over defendant's dam, thereby further increasing the height of water on this dam, and consequently on the plaintiff's wheel. And when we consider that the brook increases rapidly in width as it goes down, being three or four times as wide above Shea's Brook as it is at the mill, it must necessarily be that the water would rise higher—considerably higher—at the wheel than at defendant's dam, because running water must necessarily make an inclined plane, or it could not run at all, and because the narrow brook at plaintiff's mill could not possibly discharge the same quantity as defendant's rolling way, the width of which is many times greater, without an increase of depth. I am not, therefore, surprised at the plaintiff's statement: "Sometimes the water will back up four feet high behind my wheel in the mill, and it will be all one pond from defendant's pond to four feet high in my

mill." The statement may be exaggerated, but something similar must have occurred at every freshet. Of course the water would not in that case be still, but, as plaintiff and defendant have both described it, running down in a rapid current. I am obliged to omit the greater part of what I had written on this point, to which I have given very full consideration, but I think it necessary to give a summary of the arguments on this point, because, in my experience at the bar, I have known and been engaged in several important cases of a similar character, notably *Foster* v. *Fowler*, which was ultimately, after three trials, settled on the principles I have very briefly indicated. I know no scientific work which may be referred to to elucidate effectually a question of this kind, and we, as well as jurymen and litigants, must guide ourselves mainly by the light of practical experience and observation. That serious damage has occurred to the plaintiff's mill from the defendant's obstructions was abundantly proved. There is no doubt, on the evidence, that if these obstructions are continued the plaintiff's mill is almost useless.

The main defence was, of course, that the defendant's obstructions did not create the plaintiff's difficulty, and this defence consisted mainly of the opinions of witnesses whose theories were refuted by the facts which they either admitted or themselves proved. There is another defence which I should not omit to notice briefly. It was shown that between the foot of plaintiff's race and the head of the stillwater, eight or nine rods, there was a fall of fourteen and a half inches, and in this space there were eight or nine little sand bars, with pools between them, and rapids past them. There is one to every rod and about an inch and a half of fall to each rapid. But this was at low water, and if the water were raised on defendant's dam only fourteen and a half inches, so as to make a level to the foot of plaintiff's race, these would be all under water, covered, as I have before suggested, by what was equivalent to a marble floor. But there is another sufficient answer to this defence. It was proved that when defendant was working his old mill there were sand bars there which plaintiff used to dig out as obstructions to his water, but not only was the old mill fourteen inches lower

than the new, but those old sand bars are long since covered up. It is beyond dispute, from the evidence on both sides, that the brook has filled up there, the plaintiff says two feet, and the defendant's witnesses state the fact that it filled up. If it be now an obstruction, how came it there? Is it not obvious that, as it came down the stream, it settled and accumulated, just as the bank at Shea's Brook did, in the first stillwater it reached? That stillwater was occasioned by defendant's dam, and if the sand bars were an obstruction, they were the result of defendant's wrongful acts.

There was evidence given of some trifling leakage from plaintiff's brook into his race on one or two occasions, but nothing more, I think, than mere leakage, which I left to the jury as a ground for reducing the damages if they thought that from that or any other cause the plaintiff had contributed, by his acts or omissions, to increase the amount of backwater.

I do not think this is at all a case depending on the weight of evidence. I do not know a single material fact in the case in favor of the plaintiff which is not conclusively shewn by the witnesses for the defence, and on their testimony and the evidence for plaintiff, which they have not attempted to deny, I have no doubt whatever that the verdict should have been for plaintiff, and that this verdict, which I cannot consider a perverse, but, in my opinion, a very mistaken verdict, ought to be set aside with costs. I remember that in *Foster* v. *Fowler*, the Court said, as their judgment on the first argument for a new trial: "Well, Mr. Young, we all think that this is a case which ought, even if you are right, to be tried a second time;" and there are some causes, especially causes involving scientific questions which cannot be sufficiently well tried the first time in the hurried circumstances attending trials on our circuits. I feel for my own part very much better qualified to conduct this trial a second time from the careful consideration I have given to it at and since the argument, and I think a second trial absolutely necessary, in order to obtain a sound and satisfactory result. Had I an opportunity of studying the case before the trial, I have no doubt the result would have been different. Costs to abide the event.

McDONALD, C. J., concurred.

RIGBY, J.—In stating the reasons for the judgment in the case of *The Cobequid Marine Insurance Company* v. *Barteaux*, L. R., 6 P. C., 326, an authority above all others binding upon us, Sir Henry KEATING says: * * * "if it is plain that the evidence was such that there is ground for the belief that the jury really did act without giving that weight which they ought to do to the evidence that was laid before them, there is no reason whatever why a new trial in the interests of justice should not be directed." And in the case of *Solomon* v. *Belton*, 8 Q. B. Div., 176, the Court of Appeal held that the rule on which a new trial should be granted, on the ground that the verdict was unsatisfactory as being against the weight of evidence, was * * * "whether the verdict was such as reasonable men ought to have come to." The case at bar has given me considerable difficulty in consequence of my desire to avoid interfering in any way with the functions of the jury, but, after carefully reading over the evidence more than once, I have been driven to the conclusion that the plaintiff might be subject to great injustice if the verdict were sustained, and I do not think that it was a conclusion at which reasonable men ought to have arrived upon that evidence. The uncontradicted testimony given by plaintiff and his witnesses in relation to the obstructions which occurred in the stream before the erection of defendant's dam and contiguous to its site, the character and dimensions of these obstructions and their position and effects, as compared with defendant's dam, is not inconsistent with the evidence adduced by defendant in proof of obstructions alleged to have been occasioned by deposits in the mill-race. The question is not whether *any*, but whether *all* the backwater was the result of the causes of which defendant adduced proof. Without reference to the very strong facts in proof in relation to the alteration of Shea's Brook, I believe the jury decided the issues submitted to them without giving sufficient weight to the uncontradicted testimony to which I have referred, and I am of opinion that there should be a new trial, the costs to abide the final event of the suit.

ANDERSON ET AL. *v.* SUTHERLAND ET AL.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1883.)

Insolvency.—Composition.—Filing Second Claim after Receiving Composition.—Waiver.

PLAINTIFFS, being creditors of the defendant, an insolvent, executed a composition deed under the provisions of the Insolvent Act and received their composition, payable in several instalments, on a claim filed in September, 1876, shewing a balance of $2,036, after giving credit for a "note endorsed by T. Coffin." After the time for payment of the composition elapsed plaintiffs filed a second claim containing substantially the same debits, but omitting the credit of the note endorsed by T. Coffin & Co. The total amount of the debits in the second claim was $2,831, from which plaintiffs deducted $2,036, the amount of the first claim, leaving a balance of $795. Plaintiffs recovered a verdict for the composition on this amount.

Held, that in filing the first claim, on which the Coffin note was credited, and receiving a composition on the claim as thus filed, plaintiffs had waived the right to demand a composition on the sum that would have been due if they had not given credit for the Coffin note.

This was a rule *nisi* to set aside a verdict for plaintiffs in an action on a deed of composition and discharge, made under the *Insolvent Act of 1875*. After reciting defendant's assignment to the official assignee under the provisions of the *Insolvent Act*, etc., plaintiffs declared as follows:—"That afterward, on the third day of May, A. D. 1877, a certain deed of composition and discharge of that date, and made between the said defendants of the first part, and the several creditors of the said defendants of the second part, after reciting that the said defendants had become bankrupts, and were unable to pay their liabilities in full, and at a meeting of their creditors, duly called, had made an offer, in writing, of composition, which was approved by a majority of the said creditors present at such meeting, and that it was desirable that a deed of composition and discharge, embodying the usual conditions of the said offer of compromise under the provisions of the *Insolvent Act of 1875* and amending Acts, should be executed, the said defendants covenanted and agreed to and with all their creditors, collectively and severally, their and each of their executors, administrators and assigns, that they, the said defendants, would pay to each of them respectively a composition of twenty-five cents on the dollar of their respective claims against them individually and as co-partners, in the manner and at the

times following, that is to say, the sum of five cents on the dollar in three months from the day of the date of the order confirming the said composition, the further sum of five cents on the dollar in six months from said date, the further sum of seven cents on the dollar in twelve months from said date, and the balance of eight cents on the dollar in eighteen months from said date, and that they would give to each of their said creditors their promissory notes for such composition payments. And it was by the said deed further understood and agreed by and between the parties to the said deed that the same was made in pursuance of the *Insolvent Act of 1875*, and the amendments thereto, and might be confirmed thereunder, and also that the same should be ineffective unless and until the same should be executed by a majority in number of the creditors of the said defendants who had proved claims to the amount of one hundred dollars and upwards, and who respresented three-fourths in value of all the claims of one hundred dollars and upwards which had been so proved. And the said deed of composition and discharge was duly executed by the aforesaid proportion in number and value of the creditors of the said defendants, and the same, together with the composition therein provided for was, on order of the Judge of the County Court at Shelburne, being the court having jurisdiction in the premises, being dated and made the thirtieth day of February, A. D. 1878, duly confirmed pursuant to the provisions of the *Insolvent Act of 1875*, and the plaintiffs were creditors of the said defendants for the said sum of two thousand eight hundred and thirty-one dollars and sixteen cents, and were entitled to rank upon the estate of the said defendants for such amount, the same being duly provable against them, and to be paid the sum of seven hundred and seven dollars and ninety cents, being a composition of twenty-five cents on every dollar of their said claims, and all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to bring this action for the breach hereinafter alleged, yet the defendants did not pay to the plaintiffs, being such creditors as aforesaid, the said composition payments in the time and manner as aforesaid, but only a small part, to wit, the sum of five hundred and nine dollars and five cents;

nor did they give to the plaintiffs any promissory notes for such composition payments, and the amount of the composition payments remain, except as aforesaid, wholly unpaid, and also that the said defendants are indebted to the said plaintiffs for money payable by the defendants to the said plaintiffs for goods sold and delivered by the plaintiffs to the defendants, at their request, and for work done and materials provided by the plaintiffs for the defendants, at their request, and for money lent and advanced, and paid, laid out and expended by the plaintiffs for the defendants, at their request, and for money received by the defendants for the use of the plaintiffs, and for money found to be due from the defendants to the plaintiffs on an account stated between them, and for interest upon money of the plaintiffs held by the defendants, and forborne to them by the plaintiffs for a long time now elapsed."

Defendants pleaded, among others, the following plea:—

4th. And for a fourth plea the defendants say that they became insolvent, and obtained a deed of composition and discharge under the *Insolvent Act of 1875* and its amendments, which said deed was duly confirmed, as mentioned and set forth in plaintiff's writ, and the defendants obtained their discharge from all their liabilities mentioned and set forth in their schedule of liabilities, duly filed under said acts, (the claim of the said plaintiffs under the common counts of the plaintiff's writ being one); and the said plaintiffs duly filed their claim against said defendants' estate for the sum of two thousand and thirty-six dollars and twenty cents; and the said defendants gave their promissory notes to the said plaintiffs for the composition due thereon, according to the terms and conditions mentioned in said deed, set out in plaintiff's writ, which the said plaintiffs accepted in full satisfaction and discharge of the defendants' liability to them under said deed, and of the claim mentioned in plaintiffs' common counts, and when the said composition notes became due the defendants paid the same.

From the evidence given and the papers produced on the trial, it appeared that when plaintiffs filed their original claim they were holders of a note made by defendants, and endorsed by T. Coffin & Co., for about one-third of the amount of their account. Defendants were credited with the amount

of this note, and the claim filed for the balance. For the composition payable on this balance, plaintiffs, in common with other creditors, received notes which were duly met at maturity. Three years after the date of filing the first claim, in consequence of refusal on the part of the indorsers of the note credited thereon to pay the same, plaintiffs, after leave obtained, filed a supplemental claim, crediting defendants with the amount of the previous claim, and claiming for the balance, being the amount of the note, less a cash payment made on account.

The object of the action was to recover a dividend on the supplemental claim.

The cause was tried before Mr. Justice JAMES, who found a verdict in plaintiffs' favor for composition at 25 per cent. on $795.42, and interest.

MacCoy, Q. C., in support of rule.—Our plea that we gave notes in conformity with the terms of the deed is a complete answer to the declaration. If there was a mistake in the filing of the claim, in consequence of which plaintiff did not receive enough, he should have replied it. It would then have been for the Judge to permit an amendment. The plaintiffs had eighteen months to amend, but failed to do so. They cannot split up their claim, but are bound to file the whole. Not to do so is to evade the spirit of the act. The insolvent is now discharged from all his liabilities, and the plaintiffs have lost their remedy by their own *laches*.

Sedgewick, Q.C., contra.—The defendant is presumed to know how much he owed the plaintiffs. He made an assignment and entered into a contract for consideration to pay 25 per cent. of his indebtness, not of the proved claims. (MCDONALD, C. J. —The deed says, "25 per cent. of their respective claims." Must you not read that in the light of the Act?) The only way in which the defendant can get rid of his obligation to pay the plaintiff 25 per cent. on his full indebtedness must be by virtue of some principle of estoppel. (RIGBY, J.—He may be relieved by the construction of the Act. It may be a question whether a party is not bound by a claim filed.) It is not necessary for the creditor to prove a claim at all to entitle himself to sue under a deed of

composition and discharge. *27 U. C. C. P.*, 510. (RIGBY, J.—It may be that other creditors would not have entered into the composition at all if they had known that the plaintiff's claim was double what it was represented.) Why should we be estopped by a mistake. There is uncontradicted evidence that the defendants promised to pay this amount. In *23 U. C. C. P.*, 346, it was held that the only remedy of the creditor is under the composition and discharge. The defendants admit that they owe us $3,000, but they say: "We will not pay you, because you filed a claim for $2,000 in the Insolvent Court." Some authority should be adduced to shew that that is an estoppel. (MCDONALD, C. J.—If you you are not estopped, I don't see what answer there is to your action.) Are we precluded at any time from saying we made a mistake in our claim?

MacCoy, Q. C., in reply.—There should have been a new assignment. (*Sedgewick, Q. C.*—That point should have been taken at the trial.) There is nothing to shew that the amount of the claim is for a new indebtedness not already covered. There is conclusive evidence that plaintiffs accepted the Coffin note in full satisfaction to the amount of the debt. A party filing a claim is in the same position as if bringing an action. In *L. R., 2 C. P. Div.*, 314, the question as to splitting claims was discussed. If the security was a continuing one, it should have been valued. *4 Ontario Appeals*, 335. The release is from all claims, filed or not. *27 U. C. C. P.*, 514 and 169. The plaintiffs might have sued Coffin. *1 Ames on Bills*, 248, 249; *2 P. & B.*, 35. By their *laches* plaintiffs made the note their own. *1 P. & B.*, 579; *1 M. & M.*, 222.

RIGBY, J., (November 9th, 1882,) delivered judgment, as follows:—

The defendants, being insolvent, executed a deed of composition and discharge, under the provisions of the *Insolvent Act of 1875*, dated the third of May, 1877, by which they covenanted to pay to each of their creditors a composition of twenty-five cents on the dollar on their respective claims, in instalments of five cents in three months, five cents in six months, seven cents in twelve months, and the balance of eight cents in eighteen months from the date of the order

confirming such deed. Such order was subsequently granted by the Judge, dated February 30th, 1878. The plaintiffs, being creditors of the insolvents, in compliance with the provisions of the Act, filed with the assignee their claim against the estate, sworn to on the 27th day of September, 1876, and shewing a balance due to them by the insolvents of $2,036.\frac{20}{100}$, for which they accepted four composition notes for the several instalments provided for in the deed, and which were duly paid by insolvents. After the time for payment of the composition had elapsed, and on the 9th of September, 1879, plaintiffs filed a second claim against insolvents, sworn to on the 8th of the same month, shewing the sum of $795.42 to be due to them. The accounts annexed to each of these claims commence with the same charge against defendants, viz, a balance due December 31st, 1875, of $3,451.58, but the account annexed to the claim first filed has a credit of $1,095.52, described as "a note endorsed by T. Coffin & Co., due 12th October"; in the second claim this credit is omitted, but after giving credit for a payment of $700, and charging a balance of interest, the account to the latter shews a balance in favor of plaintiffs of $2,831.62, from which is deducted $2,036.20, the amount of the first claim, leaving the balance of $795.20. Really, therefore, each claim is for the same indebtedness, but by the second claim plaintiffs seek to avoid the effect of the credit of the Coffin note in the first one, and to establish defendants' liability in the original indebtedness as if such credit had never been given.

This action was commenced on the 22nd September, 1879, and the declaration consists of a count upon the covenant in the composition deed, and also the common counts. In the former the plaintiffs, after setting out the terms of the deed and the fact of its confirmation, allege that they were creditors of the defendants for the sum of $2,831.\frac{62}{100}$, (the same sum already mentioned as the balance in the account annexed to their second claim, before deducting the amount for which the first claim was filed,) and were entitled to rank upon the estate of the defendants for such amount, the same being duly proveable against them, and to be paid the sum of $707.90, being the composition of twenty-five cents on the dollar on such claim; the breach alleged being that the defendants did

not pay to the plaintiffs the composition payments which they had thus covenanted to pay, but only a small part, to wit, $509.05 (this being the amount of the composition notes accepted by plaintiffs and paid to them by defendants, in the amount of their first claim, as already stated.) By their third plea defendants deny that plaintiffs were their creditors for such sum of $2,831.62, or that they had filed their claim against defendants' estate, or that they were entitled to rank upon that estate for such amount, or to be paid said sum of $707.90. In their fourth plea, which is pleaded to the whole declaration, they set up the deed, and their discharge thereunder, that the plaintiffs duly filed their claim against defendants' estate for the sum of $2,036.20, and defendants gave their promissory notes to the plaintiffs for the composition due thereon, which plaintiffs accepted in full satisfaction and discharge of defendants' liability to them under the deed, and of the claim mentioned in the common counts, and that when said notes became due the defendants paid the same. There was no replication but the statutable one.

Plaintiffs having obtained a verdict for the amount of the composition on $795.42, and interest, a rule to set it aside was argued before us during the last session of this Court. Much less doubt would arise in my mind as to the correctness of this verdict if the second claim referred to a different subject matter from that embodied in the first, but even in that case I would incline to the opinion that, to get the advantage of any such additional indebtedness of the defendants, the plaintiffs should have withdrawn the first, and filed, by leave of the Judge, an amended claim for the increased amount, before the composition on the first claim had been paid. I can find within the Act no authority to justify the same creditor in having two claims filed against the same estate for the same indebtedness, even though one should, in consequence of containing additional credits, be for a less amount than the other. Section 104 of the Act provides that the claims of creditors furnished to the assignee in the form specified shall be considered as proved, unless contested, and on turning to sub-section h, of section 2 of the Act, it will be seen that it is the filing of a claim that alone constitutes a "creditor" for many of the most important operations of

the Act. In the case before us, the first claim filed by plaintiffs had to be considered in determining whether the necessary number of creditors had executed the deed of composition for the purpose of enabling the Judge to confirm it, and discharge defendants; and that section also provides that the required amount of a creditor's claim shall be over and above any set-off or counter claim of the debtor against the creditor. Surely we cannot be asked to conclude that a "creditor" within this section can subsequently file a claim for the same indebtedness but omit to allow credit for the amount which, in the former claim, he had deducted as set-off, and recover a composition upon the increased amount, which, if it had been originally specified as the true indebtedness, might have so altered the sum of defendants' liabilities as to render their deed inoperative. That deed having been confirmed it became the duty of insolvents to pay each creditor the amount of his composition at the times specified; and the amount on which such composition would have to be paid would be the sum sworn to in the several claims filed as due to each particular claimant. If the insolvent considered the amount so specified in any case as too large he could file objections to the claim; if the creditor, through mistake or otherwise, had stated his debt at a less sum than he was entitled to, he might be allowed to withdraw his claim and file an amended one before accepting the composition. In the present case, when the composition was payable, only the first claim of plaintiffs had been filed, and on the sum stated in that as defendants' indebtedness they were offered and accepted the composition agreed to be paid, and have thereby, in my opinion, waived the right to be paid a composition on any larger sum or to contend that their claim against defendants should have been made up without crediting the Coffin note.

Cases might arise in which, in a less interval than elapsed between the filing of the two claims, a note might become barred by the *Statute of Limitations*, or the parties liable thereon insolvent. Can it be said that in such a case a creditor who had credited such note as a set-off or payment in his claim would be at liberty to file a second claim for the purpose of imposing the liability for such note upon the estate of the

olvents? If so, there could be no limit to such a right, and om time to time creditors could file successive claims creasing their demands against the insolvent's estate by ithdrawing items of credit which in the meantime had ceased o have the same value as they were estimated to have when he original claim was filed. I do not think this was the intention of the legislature, nor would it be consistent with the spirit and policy of the Act.

Section 126 of the *English Bankruptcy Act, 1869*, (32 & 33 Vic., chapter 71,) is very similar to those provisions in our *Insolvent Act of 1875* relating to discharge by composition. It provides that the creditors, by resolution passed by a majority in number and three-fourths in value of those assembled at a regular meeting, and afterwards confirmed by a majority in number and value of those assembled at a subsequent meeting, might, without any proceedings in bankruptcy, resolve that a composition should be accepted in satisfaction of the debts due to them from the debtor, and that the provisions of such composition should be binding on all the creditors whose names and addresses and the amount of the debts due to whom were shewn in the statement of the debtor produced to the meetings at which the resolution was passed, but should not affect or prejudice the rights of any other creditors. The case of *Wilson* v. *Breslauer*, L. R. 2 C. P. Div., page 314, arose, under this section, out of the following facts: —The defendant having filed a petition for that purpose under section 126, a resolution for a compoeition of two shillings in the pound was duly passed by the creditors, and plaintiff was inserted in the statement of the debtor produced to the meetings as a creditor for a certain sum, and he proved for, voted in respect of, and received the dividend on a larger sum. At the time of the petition plaintiff was liable on a bail-bond which had been given to free the debtor's ship from arrest in the Court of Admiralty, but his liability on the bond was not inserted in the statement, and no claim against the debtor's estate was made in respect of it. After the dividend had been paid the Admiralty suit was decided against the debtor, and the plaintiff, having been called upon to pay under the bond, brought the action to recover the amount from endant, who claimed to be discharged from the liability by

virtue of the resolution. In the Common Pleas Division it it was held that, inasmuch as the liability on the bail-bond was a debt or liability which, though contingent, was provable under the Act, the debtor was released from it by the composition resolution. But the majority of the Court of Appeal reversed this judgment, and held that plaintiff was not bound as to this debt, it not having been inserted in the debtor's statement under section 126, and plaintiff not having voted in respect of his debt; and this judgment was afterwards confirmed in the House of Lords, (*3 Appeal Cases*, 672). Lord O'HAGAN, giving judgment on the latter appeal, says, at page 691: "It was stated amongst the reasons grounding the appeal, and for a time the learned counsel for the appellant contended at your lordships' bar, that, consistently with the facts in proof, the respondent may be held to have included in the amount of his proof the claim in respect of which he is sueing in this action; and if that were so, the appeal should certainly be allowed,"—language which seems to me fully to cover the case before us. In the Court of Appeal, Lord HATHERLY, in commenting upon the case of *Campbell* v. *Im Thurn*, (1 C. P. Div., 267,) states that that case "was simply this:—A man whose name, address and debt were not inserted in the list sent in by the debtor, nevertheless comes into the arrangement, appears, and makes a claim in respect of what he alleges to be due to him as his debt; he accepts a composition upon that debt, and, in fact, does everything as if his name had been inserted, as if his address had been inserted, and as if the amount of his debt had been inserted. The Court of Common Pleas there say "if the parties have made such an agreement, a party who so acts shall not be at liberty afterwards to say, when all that has been done, that he has not waived the condition inserted in the 126th section for his benefit; and having waived those conditions according to the maxim '*volenti non fit injuria*,' the Court held him to be justly bound by the agreement.'" And so, for analogous reasons, I think in this case the plaintiffs are not at liberty to say that they have not waived the right to demand a composition upon the sum that would be due to them if they had not given credit for the Coffin note.

It was contended at the argument that the verdict could be sustained under the common counts, but how can that be when it is clearly given on the count upon the covenant? In any case the discharge would apply to any indebtedness that has been proved. It was also urged upon us that the original indebtedness was a sufficient consideration for the promise proved to have been made by defendants to pay a composition upon the claim of $795.42, but it is enough, in answer to this, to say that the action is not brought upon any such contract.

I am of opinion that the defendants' fourth plea has been established, and that as they duly paid the plaintiffs the agreed composition on their claim, within the meaning of the statute, the alleged breach of the covenant was not proved, and the verdict should have been for defendants.

MATTHIAS *v.* PACE.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Surrender, by Re-letting Premises.

DEFENDANT, being a yearly tenant, left before the end of his term, and plaintiff re-let the premises to another. Plaintiff then sought to recover rent from defendant for one of the quarters of the unexpired portion of the term, giving credit for the amount received from the tenant to whom he had re-let. There was no evidence or finding of a consent or request from the defendant to the plaintiff to re-let.

Held, that the plaintiff could not recover.

This was a case stated for the opinion of the Court by the Judge of the County Court for District No. 1. Defendant occupied plaintiff's house as a yearly tenant, the rent being payable quarterly. During the currency of a quarter, defendant left without notice, and plaintiff re-let to another tenant, who paid a month's rent. The action was for the quarter's rent, crediting the amount received from the new tenant. The learned County Court Judge at first gave judgment in plaintiff's favor for the balance of rent claimed, but, on a review of the cases, came to the conclusion that his judgment was wrong, and granted a rule *nisi* for a new trial, which was afterward made absolute. From this decision an

appeal was allowed, the question in the case stated being whether plaintiff was entitled to recover any portion of the rent sued for, the premises having been re-let by him during the currency of the quarter.

Shannon, Q. C., in support of appeal. Cites *Woodfall on Landlord and Tenant*, p. 378.

Fielding, contra.—Surrender by operation of law may take place without, and even against the intention of the parties. *13 M. & W.*, 306. The evidence taken in the County Court should not be here. Cites *5 B. & C.*, 332; *5 Taunt.*, 518; *8 B. & C.*, 326; *3 Bing.*, 463; *12 C. B., N. S.*, 340; *2 Camp.*, 103; *2 B. & Ald.*, 113.

RIGBY, J., (November 9th, 1882,) delivered the judgment of the Court:—

This was a matter stated for our opinion by the County Court Judge of District No. 1, under section 107 of the *County Court Act*. Defendant occupied a house of plaintiff, as a yearly tenant, the rent being payable quarterly, and the action was to recover rent for the quarter ending November 1st, 1879. The Judge below found that there was a surrender of the term by operation of law on the 1st October, 1879. Plaintiff proved that defendant left the premises the middle of September, without his knowledge, and that he got another tenant about the 1st of October, who paid him rent, and his daughter testified that she had received the keys of the house from defendant, with instructions to deliver them to her father. The evidence was quite sufficient to support the finding of a surrender, and we do not see how, upon the facts in proof, it could be otherwise. The case of *Oastler et al.* v. *Henderson*, 1 Q. B. Div., 575, cited at the argument, was very like this one; and there it was said by Lord COCKBURN that "the plaintiffs, by letting the premises to a new tenant, put an end to the defendant's term from that date, for they thereby did an act so inconsistent with the continuance of defendant's term that they were estopped from denying that it was at an end."

It was contended before us, on behalf of plaintiff, the appellant, that the letting to the new tenant was at the request of

defendant, but the Judge has not so found. The only evidence in support of the contention was that of plaintiff, who, in his cross-examination testified that defendant promised to get another tenant and pay up the rent, but this is expressly denied by defendant. Plaintiff also says that on the 19th August defendant asked his permission to allow him to get another tenant, and pay up the rent. It is not stated that plaintiff was ever requested by defendant to obtain a tenant for him; indeed, plaintiff says that Pace did not tell him to put a tenant in. We do not consider the evidence sufficient to establish the contention. Where rent is payable at fixed periods, and the tenancy is determined in the middle of a period, it is clear that rent *pro rata* is not recoverable at common law, and could not be recovered in England before the passage of the *Apportionment Act*, (33 & 34 Vic., c. 35.) *Woodfall on Landlord and Tenant*, 12th Edition, p. 377. That statute does not apply to us, and the Judge below was right in holding that plaintiff was not entitled to *pro rata* rent in this case. We do not think the judgment below should be disturbed, but that the appeal should be dismissed, with costs.

BRENNAN *v.* JACK.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Use and Occupation.

PLAINTIFF brought action for use and occupation of premises by defendant, who was assignee of one McCleeve. The alleged use consisted in allowing machinery of the insolvent (McCleeve) to remain on the premises. Plaintiff had requested the defendant not to sell the machinery by tender, stating that he would make a better offer than anyone else; and the first notice that defendant had to remove the machinery was in September, 1879. The machinery was removed in February, 1880,—but the County Court Judge held that the agreement between plaintiff and defendant, being contingent, and having fallen through, plaintiff was entitled to recover for the whole period, and he allowed $200.

Held, that plaintiff could only recover for the period after the agreement fell through, that the appeal must be sustained, and judgment entered below for plaintiff for $80 for the use of the premises from September to February, being at the same rate allowed by the County Court Judge.

This was an appeal from the County Court for District No. 1. The action was for use and occupation, and the

principal defences relied on were that there was no implied contract for use and occupation, and that the plaintiff's remedy was by summary application to the Insolvent Court, the defendant having had no other use of the premises than as assignee, under the *Insolvent Act*, of the tenant. JOHNSTONE, County Court Judge, gave judgment in favor of the plaintiff for $200, from which defendant appealed.

W. B. Ross, in support of appeal, cites *Clarke's Insolvent Act of 1875*, p. 217, section 74. Under that section the assignee had a right to continue the occupation of the premises as long as he required them for the benefit of the estate, and the landlord would be entitled to be paid in full out of the estate. The word "leased" in the clause is merely descriptive of the premises. The remedy of the landlord, the plaintiff in this action, is pointed out in section 125 of the Act, (page 293 of *Clarke*). The authorities under these sections are *36 U. C. Q. B.*, 464; *34 U. C. Q. B*, 581. The test is, could the creditor prove against the estate? If he could, he has to proceed under section 125. *35 U. C. Q. B.*, 1; *32 U. C. Q. B.*, 601. The only time, plaintiff says, defendant promised the rent should be paid, was after plaintiff had sent his bill for rent, six months after defendant began to occupy as assignee. No matter what the defects of the bargain were, it is sufficient for our argument that there was a bargain, by which plaintiff was to buy the goods for the storage of which rent is claimed in this action. The goods were left in the premises for plaintiff's own benefit. There was no implied contract to pay for the premises until that bargain went off. *Howard* v. *Shaw*, 8 M. & W., 118; *7 Pick.*, 301; *Birch* v. *Wright*, 1 T. R., 387; *5 N. & M.*, 204; *Temple* v. *McDonald*, 2 Oldright, 155.

MacCoy, Q. C., contra.—If there is any evidence to support the judgment here, it would stand, under the principles governing Courts of Appeal; *2 Scotch Appeals*, 54, where the rule is laid down under a statute granting appeals on questions of fact, as here. There is evidence here that the bargain as to sale of goods was terminated nearly six months before the end of the year sued for. We only have judgment for six months' rent. The insolvent's lease from plaintiff ceased, by its terms, with the insolvency. Plaintiff's own tenancy of the

whole building had terminated a few days before, and he got a new lease of the whole building soon after the defendant, as assignee, began to use the premises sued for. Plaintiff terminated the bargain by demanding rent at the end of six months. He swears defendant promised he should be paid after being billed, that is, after the first six months. (McDONALD, C. J.—That very demand for rent for the past six months was a violation of his bargain, not a revocation.) The promise to pay is at least sufficient to support the judgment here. There is other evidence here that the plaintiff should take the goods for rent.

RIGBY, J.—It looks to me as if the negotiations for the sale were going on to the end, and plaintiff looking for rent at the same time.

RIGBY, J., (November 9th, 1882,) delivered the judgment of the Court:—

This was an appeal by defendant from a judgment, for $200, of the County Court for District No. 1. The defendant was the assignee, under the *Insolvent Act of 1875*, of one McCleeve, to whom, previous to his insolvency, certain premises had been leased by plaintiff, and the claim was for the use and occupation of these by defendant for one year, by continuing to keep therein certain machinery belonging to the estate, which was there when he became assignee. It is plain, from the language of the judgment appealed from, that the sum allowed the plaintiff is for the use and occupation of the premises for one year, and as there is no evidence of any express contract to support this finding, it cannot be sustained unless there are facts in proof from which a contract can be implied. There is uncontradicted testimony that the defendant, as assignee of McCleeve's estate, and the inspectors proposed to sell the machinery in question by tender, but at plaintiff's request they did not do so, the latter stating that he would make a better offer for the machinery than could be obtained elsewhere. He specified a sum which he was willing to give for it, but as his estate was also in liquidation the offer was contingent upon his obtaining his discharge, and was thus accepted by the assignee; and the machinery, in

consequence, remained upon the premises. The Judge below finds that this agreement was only a contingent one and fell through, and that there was nothing to prevent the plaintiff from recovering against the defendant for the time the premises were occupied by the machinery. I cannot concur in this, in so far as it relates to such occupation for the period when the goods remained in the premises, subject to the contingent agreement referred to. For such period no contract to pay for the use and occupation can be implied any more than where a party is in occupation of premises under a contract of purchase, which subsequently goes off. *Howard* v. *Shaw*, 8 M. & W., 118. Defendant says that the letter of the 19th September, 1879, was the first intimation he had to remove the goods, and this is not denied; and as I can find no other evidence from which to determine when the contract of purchase fell through I think that for the occupation of the premises from that date down to the bringing of this action, February 11th, 1880, he is liable to the plaintiff; the value of which, estimating the amount according to the sum allowed by the Judge for one year, and which does not seem unreasonable, would be, in round figures, eighty dollars. The matter in controversy, according to this view, does not come within those sections of the *Insolvent Act* which refer to property which has been held by the insolvent under lease, and I do not think the plaintiff was bound to proceed for the recovery of his claim according to the provisions of section 125 of that act, any more than he would have to do so to recover the price of goods sold by him to defendant, or to enforce any other contract entered into between them after defendant had become assignee.

The appeal, according to the conclusion at which I have arrived, should be sustained, with costs, and judgment entered below for plaintiff for $80 and costs.

McDONNELL ET AL. *v.* McMASTER.

Before McDONALD, C. J., JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Registry of Deed not prima facie *proof of delivery.—Objection to bail taken at argument too late.*—Gammon *v.* Joudry *questioned.*

THE question in an action of ejectment turned on the execution of a deed from one H. M. to R. M. Plaintiff produced no other evidence to the jury than the certified copy of the Registry, under *Revised Statutes*, cap. 96, sec. 33; and the grantee swore that he had never seen the deed from his father. The Judge who tried the cause left it to the jury to find, from the registry as *prima facie* evidence, that the deed had been executed.

Held, That this was a misdirection, and that there was no evidence of the delivery of the deed.

A preliminary objection was taken at the argument that the bail was defective.

Held, That under the present system of printed cases the objection was too late.

Per RIGBY, J.—That, as the material necessary to enable the Court to consider the objection was not included in the case as furnished, the objection was not open to the plaintiffs.

Gammon v. Joudry, 2 R. & C., 314, questioned.

This was a rule taken under the statute to set aside a verdict for the plaintiff in an action of ejectment. The facts appear sufficiently in the judgment of the Court, as delivered by McDONALD, C. J., below.

J. J. Ritchie takes a preliminary objection that the bail-piece does not shew the place at which it was taken. It is left blank. It does not follow the practice. *McKenna v. Tracey*, 1 R. & G., 392.

McDONALD, C. J.—I think you are too late.

(Objection noted.)

Attorney-General.—I would like to be heard on the objection if the Court thinks there is anything in it.

Meagher.—The case was never submitted to us. There is no rule in the cause.

Attorney-General, in support of rule.—Plaintiffs title is as follows:—The first deed is from Hugh McMaster, Senr., to Ronald McMaster, dated 18th June, 1856. We object to the reception of that deed, because there was no evidence of its passing as a deed. Mr. Macdonnell tendered a certified copy of the deed without proof that there was an original. The delivery was disproved by the grantee, who said he never heard of the deed from his father.

(McDONALD, C. J.—Can he not adopt that title afterwards?)

I don't think that the mere fact of mortgaging would be sufficient. (RIGBY, J.—Would not the Judge put it to the jury whether the deed was delivered?) The next step in the title is the mortgage from Ronald to Smyth, 19th April, 1869, and next the Sheriff's deed, 3rd October, 1874, based on that mortgage.

Coming to another branch of this title, there is a mortgage from John McMaster to Peter Smyth, 13th April, 1869, and Sheriff's deed based on that 3rd October, 1876. We claim that the deed to Ronald was never delivered in any way that would pass title. After it purports to have been delivered, the *Statute of Limitations* bars the right in Ronald. His mortgaging the property does not shew any ratification of a deed of which he knew nothing. The mortgage is accounted for by the fact that Ronald was an heir-at-law, and the presumption is that he was mortgaging his interest, as such. There is no evidence of delivery; the only evidence is of non-delivery. The mortgage was made ten years before he had any knowledge of the deed. There is nothing on its face or outside of it to indicate that he was conveying the property conveyed to him by Hugh. It only purports to be a conveyance of his estate, and the covenant for title is only "in manner and form as conveyed." *21 Am. Reps.*, p. 205; *2 Kerr's N. B.*, 408; *1 Am. Reps.*, 101; *105 Mass.*, 560; *8 Metc.*, 447; *3 Metc.*, 275; *3 Wallace*, 636; *8 D. & R.*, 348; *1 Binney*, 502.

J. J. Ritchie, contra.—Under the pleadings there can be no question of title at all. They admit our title. They do not deny it. The only question to be tried is whether they are co-tenants with us. In the rule *nisi* no objection is taken to the reception of the certified copy of the deed from Hugh to Ronald. It is not open to them now to say that that was improperly received. (RIGBY, J.—They take it more specifically than that in the 4th ground, in which they say that there was no evidence of the delivery of that deed, and that there was evidence to the contrary.) I am meeting the objection to the admission of the certified copy. The statute clearly allows the certified copy to be admitted. (RIGBY, J.—Is the certificate on the certified copy evidence that the deed was registered?)

Yes. The deed was properly received. We have the verdict, and we must assume that the question of delivery was put by the Judge, and here there is some evidence of delivery. There is, in the first place, a presumption of delivery, which they had to rebut. *2 Greenleaf on Evidence*, section 297; *12 Pick.*, 141. There is also a clear acquiescence on the part of Ronald. He gave a mortgage of this very land subsequently to his knowledge of it. His covenant is as to the whole tract. That was evidence for the jury of an acquiescence in the deed from his father. (RIGBY, J.—My impression would be that we must assume that there was a charge, because it is the duty of the Judge in every case. If he had said that he had not charged the jury, it would be a different thing; but where he says nothing at all, and reports a verdict for plaintiff, we must, I think, assume that he did charge the jury properly. If he did charge them properly, Mr. Ritchie contends that they have found a fact upon which there is evidence on both sides. That, in turn, depends on whether there is a presumption of delivery. Mr. Ritchie contends that registry raises a presumption of delivery. How is the registry proved. Is the certificate of the registrar proof of the registration? There is no statute making it so.) It is to be presumed that the Judge charged the jury, and charged them properly. There is no ground in the rule for non-direction, or that there was a mis-trial for want of a charge to the jury. In the case cited from *2 Kerr*, 408, the registration was effected at the instance of the grantor, after the conveyance had been expressly refused by the grantee.

Attorney-General, in reply.—The deed from Hugh McMaster to Ronald McMaster describes 250 acres at Judique; the writ of *habere facias* describes 150 acres at Great Judique; the writ of ejectment in this case describes 200 acres; the bounds are not identical; and there was no evidence of identity. When plaintiffs called Ronald McDonald, and he proved that the deed from Hugh had not been delivered to him, they should have been prevented from relying upon any presumption of delivery arising from registration. They disproved the presumption themselves. The plea to which exception has been taken follows the requirements of our

statute explicitly. The only evidence of registration here is the secondary evidence of the deed, which the statute only makes evidence of the deed, not of registration.

McDONALD, C. J., (November 9th, 1882,) delivered judgment, as follows:—

This is an action of ejectment, tried before Mr. Justice McDONALD, at Port Hood, in October, 1880. The verdict was for plaintiff. The suit was commenced by the late Honorable Peter Smyth, and, on his death, the present plaintiffs, his executors and trustees, intervened. The plaintiffs claim under deed from Hugh McMaster, Senr. (father of the defendant Hugh, and the late husband of the defendant Margaret McMaster,) to Ronald McMaster, a brother of the defendant, Hugh McMaster, dated 18th June, 1856. Ronald McMaster, by deed bearing date 19th May, 1869, mortgaged the premises in question to the late Peter Smyth. This mortgage was foreclosed, and a deed of the mortgaged premises made by the Sheriff of Inverness, under the order of foreclosure, to Mr. Smyth, on the third day of October, 1874. The writ in this action was issued on the 31st December, 1878. The defendant, Margaret McMaster, suffered default. The defendant, Hugh, appeared, and pleaded a tenancy in common with the plaintiffs; and his contention, as developed on the trial, is substantially this, that the deed upon which the plaintiffs rely, from his father, Hugh McMaster, Sr., was never executed, and, consequently, that the mortgage of the latter conveyed only his individual interest as one of the heirs of his father. Hugh McMaster, Senior, died in 1859, or thereabout, in possession of the land in dispute, and the defendants have continued to occupy and cultivate the same to the present time. The only evidence of the deed from Hugh McMaster, Senior, to Ronald McMaster was the certified copy from the Registry of Deeds for the County of Inverness, admitted by the learned Judge on the trial under section 33, chapter 96, *Revised Statutes*. There was no evidence whatever of the execution of the deed; indeed, there was no evidence that any deed had ever been executed, except the production of this certified copy from the registry. It did not appear by whom the original deed had been left for registry, or by whom the registry had been

made, nor was there any proof of the registry, except in so far as the certificate of the registrar of deeds may be accepted as such proof.

The minutes of trial do not include any report of the charge of the learned Judge to the jury, nor does it appear therefrom that the question of the execution of the deed, especially the delivery thereof, was submitted to the jury. I, however, mentioned the point to my brother McDONALD, and am informed by him that the point was raised at the trial, and was submitted to the jury on the evidence reported. It must therefore be considered as decided against the defendants, under the instructions of the learned Judge, and it would appear that the defendant's counsel had the point directly in view when framing the fifth ground in his rule *nisi*, viz., "Because of the mis-direction of the learned Judge who tried the cause in directing the jury that there was sufficient evidence of the execution and delivery of the deed from Hugh McMaster to Ronald McMaster." I think we must assume that the instructions of the learned Judge to the jury left them at liberty to come to the conclusion that the production of the certified copy of the deed from the registry was *prima facie* evidence of the execution and delivery of the deed which would justify a verdict for the plaintiffs. As I have said, the only evidence of the execution of this deed is the certified copy from the registry. That the execution of a deed includes its delivery to the grantee and that delivery is essential to the perfecting of a deed will be admitted to be an elementary principle of law. and it appears to me that the only question for our consideration is whether there is any proof of such delivery here, or in other words, whether the fact of a paper purporting to be a deed being found on the registry books of any county in this Province is of itself *prima facie* evidence of the due execution of an original deed; this execution, of course, including its delivery to the grantee,—such delivery, I mean, as will satisfy the rule at law in that respect.

In *Younge* v. *Guilbeau*, 3 Wallace, 636, the Court said:—"The proof of the execution of the deed necessarily involved proof of its delivery. The evidence offered, so far as appears by the record, shewed that the grantor never parted with

its possession, *except as may be inferred from the fact of its registry*, and the grantee testified *that he never knew of its existence until after the death of the grantor*, among whose papers it was found, and that he never claimed any interest in the property. * * * * The delivery of the deed is essential to the transfer of the title. It is the final act without which all other formalities are ineffectual. To constitute such delivery the grantor must part with the possession of the deed, *or the right to retain it*. The registry *by him* is entitled to great consideration upon this point, and might, perhaps, justify, in the *absence of opposing evidence*, a presumption of delivery. But here any such presumption is repelled by the attendant and subsequent circumstances. Here the registry was, of course, made without the assent of the grantee, as he *had no knowledge of the existence of the deed*, and the property it purported to convey always remained in the possession, and under the control of the grantor." And in *Hawkes* v. *Pike*, 105 Mass. Reports, 560, the principle is laid down as follows:—"A deed of real estate, in order to take effect as a conveyance of title, must be delivered by the grantor, and *actually* or by *implication* accepted as his own by the grantee. No definite or specific formality is prescribed by law, but it must be the concurrent act of two parties. It must appear that the grantor parts with the control and possession of the instrument, with the intention that it shall operate immediately as a transfer of title, and that it passes into the hands, or is placed at the disposal of the grantee, or of some other *person on his behalf*. The registrar of deeds may have been the person agreed upon as the agent of the grantee, *and in such a case a deed left with him for record is sufficiently delivered*. But registration of itself does not operate as a delivery, nor does it supersede the necessity of proof of delivery." In *Parker* v. *Hill et al*, 8 Met., 447, Chief Justice SHAW said:—"Undoubtedly, registration, even by the grantor, will not operate as a delivery nor supersede the necessity of proof of delivery, but where both are proved, it is no objection to the delivery of a deed that it was after registration." In *Jackson* v. *Dunlap*, 1 American Decisions, 100, a deed was duly executed and acknowledged by the grantor, but retained by him with the grantee's consent until

the consideration money was paid and, before payment, the grantor died, having devised the premises in his will, and the deed was found among his papers. The Court said:—"Although formally executed, the deed was, in fact, not delivered. It was in substance a conditional execution, and not otherwise claimed or accepted by the grantee. It is also essential to the legal operation of a deed that the grantee assent to receive it. It cannot be imposed upon him and there can be no delivery without an acceptance."

The ruling of the English Courts on the question of, and necessity for delivery of a deed to render it operative will be found fully discussed in the case *Doe d. Garnon* v. *Knight*, 8 D. & R., 348, where the general principles are fully discussed, and the doctrine stated in the American cases cited substantially recognised. As to the acceptance by the grantee, the English courts appear sometimes to admit the consideration of equitable circumstances, and in some cases have held the deed valid where it was clear that the grantee had, at the time of its execution, no knowledge of that execution, and had accepted no personal delivery. The following from *Sheppard's Touchstone* was cited as recognised authority in the case in *8 D. & R.*:—"A deed may be delivered to the party himself to whom it is made, or to any other by sufficient authority from him, or it may be delivered to any stranger, for and on behalf and to the use of him to whom it is made, without authority. *But if it be delivered to a stranger, without any such declaration, intention, or intimation*, unless it be in a case where it is delivered as an escrow, it seems this is not a sufficient delivery." We cannot expect to find authority in English reports on the direct point raised in the case at bar, as they have not there our system of registry, but the general principles governing the execution of deeds are the same in England and the United States, and the authority of the cases from the latter country, on points where their laws and practice are similar to our own, must be received as of great weight. In view of the law as settled by these authorities, the testimony of Ronald McDonald, the grantee, as given at the trial, is worthy of consideration. He says:—"I recollect my father; he died twenty-one or twenty-two years ago,—in 1859, I think; he lived at Judique, on land as described in

the writ, except that Angus should be substituted for Allan McDonald; * * * my father lived there before I was born, and died there; I am forty-eight to fifty; I never saw a deed from my father to me." *Cross-examined*:—"I never heard of it till a few years ago; I left home when fourteen or fifteen years old, about thirty-five years ago; I was not in possession of it since." There is no other evidence of the execution or delivery of this deed. It is quite clear that there could have been no delivery to the grantee, who states that he had left home many years before its execution, and did not hear of its existence till a few years ago, or many years after his father's death. There is no evidence of the delivery of the deed for registry, or to the registrar; no evidence to shew that such delivery to the registrar, if made, was by or with the consent, knowledge, or authority of the grantor, while it appears beyond doubt that there was no acceptance by the grantee, who was ignorant of the existence of such a deed till within "a few years" of the trial, and presumably not till after the date of the mortgage to Smyth. It will be observed that the words used in the granting clause of the mortgage are quite consistent with the intention of Ronald McMaster to mortgage only his undivided share and interest in his father's estate. He grants, etc., "all and singular the estate, right, title, interest, claim, property and demand, in, to," etc., (the land owned by his father in his life-time).

Several other objections were taken at the argument by the counsel of the defendant, some of them deserving of serious consideration, particularly the contention based upon the possession of the defendant. I do not, however, think it necessary to discuss these, as, in my opinion, the plaintiffs have failed to prove a delivery of the deed upon which their title rests, and, as I think, the learned Judge should so have instructed the jury, the verdict for the plaintiffs must, in my opinion, be set aside with costs.

I am aware that the late Chief Justice of this Court, whose opinions must always be received with great respect, intimated in *Gammon* v. *Jodrey*, 2 R. & C., 314, that "the registry is evidence of delivery." It was not necessary to decide the point in that case, and the learned Chief Justice does not indicate what evidence of registry he would consider

sufficient evidence of delivery, or whether his observation would extend to a case like the present, where there is no evidence of registry with the knowledge or consent of grantor or grantee.

In reference to the preliminary objection taken by Mr. Ritchie that the appeal must fail for defective bail, I think, with the Attorney-General, that the objection cannot be taken on argument. I think, even before our present system of printed cases, the objection should be preliminary to the argument, but clearly under the present practice it must be so.

JAMES, J., concurred.

RIGBY, J.—At the argument of the order *nisi* in this case plaintiffs' counsel asked to have it discharged, because of an alleged defect in the bail-piece. As the material necessary to enable us to consider this question was not included in the printed case furnished to us for this argument, under the rule of Court for that purpose, we are of opinion that the objection was not open to plaintiffs on this argument. I concur in the opinion just read by the Chief Justice.

IN RE "EFFIE SWEET."

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1883.)

Taxation of ships.—Port of registry.

Held, That a vessel registered in the port of Halifax and owned by a trader resident at Isaac's Harbor, which was not at the time of the assessment in the district of Isaac's Harbor or the County of Guysboro', was not assessable in the district of Isaac's Harbor for County rates.

JAMES, J., dissenting.

A rule *nisi* for a writ of *certiorari* was granted in this case to remove proceedings from the Municipal Council of the District of Guysboro to this Court, upon an affidavit setting out the following among other facts:—

That the firm of S. Sweet and Company were and are rate-payers at Isaac's Harbor, in that part of the County of Guysborough known as the District of Guysborough, and their property at Isaac's Harbor aforesaid was assessed thereat for

the year 1879 for district and school purposes, and the assessment for said year 1879 included the schooner "Effie Sweet," owned by said firm, and assessed for said year 1879 at the sum of two thousand five hundred dollars.

The said schooner "Effie Sweet" was never registered in the District of Guysborough, nor in the County of Guysborough, but at the time of said assessment was, and ever since has been, and now is duly registered in the City of Halifax. That at the time of said assessment the said schooner "Effie Sweet" was not in the County of Guysborough.

That after said assessment the said firm paid the same, including the assessment upon the said schooner "Effie Sweet," as they were required to do by law, and appealed from said assessment to the Municipal Council of the said District of Guysborough, on the ground that said vessel was not liable to assessment in said district, never having been registered therein, and said appeal was disallowed.; that having considered said appeal, the said Council gave their decision thereupon as follows:

"JANUARY 11TH, 1881.

The petition of S. Sweet & Co. was considered by the Council, and its prayer, on motion, refused.

A. H. MCGILLIVRAY,
Municipal Clerk."

That no notice or intimation of such decision was given to or received by the said firm, or either of them, until after the expiration of more than ten days after said decision was given.

On the first day of the Sittings of the Supreme Court at Guysboro, where the rule *nisi* was made returnable, the rule was enlarged by consent to the next Term at Halifax, and the points to be argued were stated as follows:

First. Whether a vessel registered at Halifax, and not in the District and County of Guysborough, but built and owned by persons residing in the District and County of Guysborough, and who are liable to be assessed in the said District, entitles the vessel to be assessed in said District *(sic.)*

Secondly. Whether a vessel built and owned in the District and County of Guysborough, but not being in the

County at the time of assessment, and being registered at Halifax, is liable to such assessment for District purposes.

The cause was set down for argument before one of the Divisions of the Court, but it was finally agreed that it should be decided upon written arguments to be furnished to the Court by the counsel for the parties. Written arguments were accordingly prepared, and submitted by O. S. Weeks, Esq., for the Municipality, and by B. H. Eaton, Esq., for the owners of the vessel.

McDONALD, C. J., (November 9th, 1882,) delivered judgment, as follows:—

Messrs. Sweet & Co., traders, resident at Isaac's Harbor, in the County of Guysborough, were the owners of the schooner "Effie Sweet" in the year 1879. The vessel was registered in the Port of Halifax, and was not in the District of Isaac's Harbor, or in the County of Guysborough when the assessment was made. This schooner was included in the personal property for which Sweet & Co. were assessed in the year 1879 for school rates in the District of Isaac's Harbor. They appealed on the ground that the "Effie Sweet" was not assessable in that District.

Chapter 21, section 17, *Revised Statutes*, (4th Series,) enacts that "one-fourth and no more of all local and direct taxes shall be levied and assessed by an equal rate as a poll tax on all male persons *living within the district*, of the age of twenty-one years, and not being paupers, and the other three-fourths shall be levied and assessed upon the whole taxable real and personal *property of the locality*." Taxable personal property, under this Act, is defined by section 15 and schedule A of the Act, and includes one-half of the value of ships afloat, *whether in this Province or elsewhere*. The appellants contend that the case is governed by *Kenny* v. *The City of Halifax*, 3 Sup. Court Reports, 497. The statute discussed in that case, viz., the *City of Halifax Act*, provides, (section 330,) that "the City Council shall have power to assess on the inhabitants and on the property within the city annually such sums," &c., and section 340 enacts that the assessments shall be rated upon the occupants, &c., * * * by an equal pound rate upon the value of the real and

personal estate within the city, &c. Section 19 of the General Assessment Act provides "that the assessors for each township or *district* shall proceed to ascertain by diligent inquiry the names of all the taxable inhabitants, and also all taxable property *within the same*, its extent, amount and nature." In my opinion the words "in the locality" and "within the district" in the General Assessment Act, and "within the city" in the Halifax Act, are identical in meaning, and must be so construed. The Court of Appeal has, as I understand, decided in *Kenny* v. *The City of Halifax*, that, in the absence of statutory provisions to the contrary, the port of registry of a vessel owned in this Province shall be the locality or district of ownership, or her "home port," irrespective of the place of residence of the owner or owners, and that she is not personal property assessable in any other district or locality. Under this authority it must be held that the "Effie Sweet" was not personal property "of the locality," or "in the district" of Isaac's Harbor at the time of the assessment appealed against. The result of those decisions would appear to be the exemption from local and municipal taxation of the large proportion of the capital of the country invested in shipping —a subject, it appears to me, well worthy of the consideration of the Provincial Legislature.

RIGBY, J.—I agree with the Chief Justice that this case is governed by the decision in *Kenny* v. *City of Halifax*; the words used in the General Assessment Act to designate the property to be assessed being virtually the same as those used in the City Act, and upon which that decision was based.

JAMES, J.—This is a motion to make absolute a rule *nisi* for a writ of *certiorari* in favor of the owner of the schooner "Effie Sweet," which comes before us on a special case, the question to be determined being whether the vessel, being owned by a resident of the County of Guysboro', but not registered or present within the county at the time of the assessment, is liable to be assessed under the provisions of the County Assessment Act. The Statute, chap. 21, sec. 15, p. 113, and Schedule A., p. 127, under the head of Personal Property, renders liable to taxation "one-half the value of ships

afloat, whether in the Province or elsewhere." The applicant, (in his written argument), relies almost entirely upon the decision of this Court in *Kenny* v. *The City of Halifax*, 1 R. & G., 39, and the same case on appeal in *3 Duval*, S. C. R., 504, and the Municipality rely on certain *dicta* of the Judges in the decision of that case and upon the different wording of the two statutes.

The *City of Halifax Corporation Act*, under which the Kenny case was decided, enacts (section 330) that "The City Council shall have power to assess on the inhabitants and on the property *within the City*," such sum as may be necessary, &c. Section 340 enacts that there shall be "an equal poundrate upon the real and personal property *within the city*," and section 347 defines personal estate as "including all household furniture," &c., * * * * and "all ships or vessels, or shares in ships or vessels owned by persons residing or having offices or doing business within the city." Up to this point in the City Act there is no doubt or difficulty whatever; and the principle would undoubtedly seem to be that personal property within the city, and that only the owners being resident or represented, should be liable to assessment, were it not for the words immediately ensuing those I have quoted, viz.: "*whether such ships or vessels be at home or abroad at the time of assessment.*" Any difficulty there is in the comparison of these two statutes arises from the introduction of these words, which, taken by themselves, may appear at first sight to be inconsistent with sections 330 and 340. But I think that a little consideration will shew that, taken in their true sense, they are not at all inconsistent.

The words "at home" are settled in the case cited to mean "at the port of registry." This is the substance of the opinions of the Judges in the judgment appealed from and the express and reiterated language of RITCHIE, C. J., in delivering the judgment of the Court on the appeal. This is therefore settled, and this helps us very much to understand the meaning of the word "abroad," which is not expressly defined by the Courts in either judgment. The counsel in this case appear to have considered, in referring to the decided case, that the term "abroad" meant absent from the place of residence of the owner, or absent from the Province; and no

where do I find what I consider to be the correct definition. If a vessel's "home" is her place of registry, then "abroad" must mean absent—not from her owner nor from her native Province, but from her place of registry. If we adopt this simply logical reasoning, which appears to me to be only necessary to be suggested, and to require no argument whatever to sustain it,—section 347, taken with sections 330 and 340, would read thus:—"All ships or vessels, or shares of ships or vessels (within the city,) owned by persons residing or having offices or doing business within the city, whether such vessels be at home," (that is, at Halifax, their port of registry,) "or abroad," (that is, in Halifax, but absent from their port of registry—it may be Yarmouth, Maitland or some foreign port,) are subject to taxation." Vessels are only in port under the protection of the municipal law part of the time, and both statutes, it appears to me, recognize the injustice of taxing them for municipal purposes, but in different ways. The City Act says:—"We only tax property within the city—while you are away you are free from taxation, but if you are in port at the time of the assessment you shall be taxed—we will tax you the full amount while you are under our protection—we will apply to you the same treatment which we give to other personal property. If a horse is brought into the city by his resident owner at the time of assessment, he is taxed. If he is sold out of the city the following month or week the tax is not remitted. We treat ships and horses precisely on the same principle." This is quite fair and consistent, and I consider it the simple meaning of the Act; and on this principle I think the Kenny case might have been decided, with the same result which has happened.

The County Assessment Act gets over the injustice of taxing property only occasionally within municipal protection in a different way; that is, by providing, in Schedule A, that the inhabitants, (for they have no power to assess anybody else,) shall be assessed for "all chattels of every description at their actual cash value," except as qualified beneath, viz., "one-half of the value of ships afloat, whether in the Province or elsewhere." Surely nothing can be plainer than this enactment; it does not refer to a vessel's home or locality or registry; it includes plainly vessels not yet registered or not

qualified by size, &c., for registry. It refers to all vessels "afloat," whatever and wherever they may be, but only taxes to one-half their value, while the City Act refers to vessels actually within the city and owned there by persons represented there, and to those only. It appears to me the two statutes are perfectly consistent with their several principles. I do not see how any legislation could be better framed to suit the circumstances of each case. It would be easy to shew that while the view I take obviates every objection that has been urged from the necessities or equities arising from the circumstances, the City Act could not be applied to the County Assessment without creating great difficulties, and *vice versa*. The statute under consideration, in my opinion, clearly makes the applicant's vessel liable to taxation to half her value. The 17th section of the general Assessment Act, after providing for a poll tax for one-fourth of the amount to be assessed, goes on to say, "and the other three-fourths shall be levied and assessed upon the whole *taxable* real and personal property of the locality," not "in," or "within" the locality. It seems to me that this phraseology was adopted to meet the very case we have under consideration, the case of a ship afloat and absent which, by Schedule A, is made a part of the "taxable personal property of the locality." It says, "one-half the value of ships afloat, whether in the Province or elsewhere." Had section 17 said "in" or "within" the locality, the two sections would have been inconsistent, and we should have to resort to other statutes *in pari materia*, or to general principles to get at the meaning, but as they stand they are, I think, consistent with each other.

Section 19 of the Act provides that the assessors shall "ascertain by diligent enquiry, the names of all the taxable inhabitants, and all taxable property within the same"; but that part of Schedule A which I have quoted, is not at all contradictory to this, but is an independent clause in addition to it, enacting that ships shall be taxed to one-half their value, though out of the Province, and therefore of course *over and above* the property within the district.

I think, therefore, that the rule *nisi* for *certiorari* should be discharged, but without costs under the agreement contained in the case submitted to us.

DICKIE *v.* BLENKHORN.

Before McDONALD, C. J., and JAMES and RIGBY, JJ.

(Decided November 9th, 1882.)

Action for money paid.—Plaintiff's assignor having given note for defendant's benefit.—Barclay v. *Gooch.*

PLAINTIFF'S assignor gave his promissory note for the amount of a premium on a policy of marine insurance on a vessel of which said assignor and the defendant, with others, were part owners. The note was never paid and the policy stipulated that in the event of the premium not being paid, the company might cancel it. Plaintiff, as assignee in bankruptcy, sued the defendant for his share of the premium, as money paid.

Held, That whatever might be plaintiff's rights, had the note been accepted as a payment and the defendant released, there could be no action for money paid in the present case.

Barclay et al v. *Gooch*, distinguished.

This was an appeal from the County Court for District No. 4. The action was brought to recover contribution from a co-owner for premiums alleged to have been paid by plaintiff's assignor for insurance of a vessel, of which he was managing owner. BLANCHARD, County Court Judge, gave judgment for plaintiff for $22.50, defendant's share of premium paid on one of two policies alleged. From this judgment defendant appealed, giving security under the statute.

Meagher, Q. C., in support of appeal.—There is an admission in the evidence that the premium was not paid. Can a party after having admitted that the premium was never paid, turn round and say he made a payment because of the estoppel.

McDONALD, C. J.—The question appears to us to be whether, under the pleadings in this case, and in view of the fact that no money was paid, the plaintiff can recover. We will therefore not trouble you further at present, but call upon the other side.

Harrington, Q. C.—The case of *Barclay* v. *Gooch*, 2 Esp., 571, has been questioned. It is referred to in *Taylor* v. *Higgins*, 3 East., 169, which it is claimed overrules it. That case is not a similar case. In *4 Pick.*, 444, the case of *Barclay* v. *Gooch* is expressly recognized as law. *2 Metc.*, 564; *14 Pick.*, 285. (McDONALD, C. J.—The statement in the policy would be an estoppel against the company in an action by the insurer on the policy, but it does not appear to me to bind

the defendant in an action against him for contribution.) The company knew that Payzant was acting for the other parties. The other parties were not liable to the company for the premium, as the company had elected to take Payzant for it. *1 Parsons on Insurance,* 503. The note was a payment just as much as if he had given the note of a bank which afterwards failed.

The company are estopped as against the owners from saying that the money is not paid, because of the receipt in their policy. As they could not deny the payment the effect is the same as if a payment was actually made by Payzant, and he can therefore recover from defendant for contribution. Mr. Allison's evidence is inadmissible. The defendant admitted that he was liable to somebody for the premium.

Henry, Q. C., with *Harrington, Q. C.*—The main position in our case is that if a note is taken as payment it enables the maker of the note to recover in an action for money paid against all persons responsible to him as contributor. Apart from the effect of the policy as an estoppel, and the question whether it can so operate between the parties to this action, the evidence shows that the note was accepted by the company as payment. All the evidence Allison gives is of custom, and is objected to, and he does not contradict the express statement of the plaintiff's witness that the note was received as payment.—The witness's word was "settlement," which, in common parlance, means payment. The policy is evidence of the substantial benefit that defendant received from the money alleged to have been paid and laid out by the plaintiff's assignor; and it is evidence to reduce the force of the statement of Allison that it was not the custom of their office to receive notes as payment.

The notice in reference to insolvency is not inconsistent with the contention that the note is payment. (The notice is as follows:—"If the maker of any note for premiums on this policy shall become insolvent before the same is due, it shall be lawful for the directors to cancel this policy, provided said premium be not paid, or secured to them, within three days after notice of such intention, given by the Secretary or any agent of the company to the maker of said note, or served

upon the assignee or any person interested in the policy; but the company shall be entitled to recover the proportionate amount of premium for the time during which the insurance has existence.") (McDONALD, C. J.—I don't see how it can be contended, in view of that notice, that the note was a payment.) That is only a condition upon which the policy may be cancelled, and does not differ in its legal effect from any other condition.

Attorney-General in reply.—*Barclay* v. *Gooch* was reported by an inferior reporter, was a *nisi prius* case, and has never been referred to in an English case except to be condemned, or in an American case except to be distinguished from cases such as the present. In *3 East.*, 169, it was condemned. So again in *2 B. & Ald.*, 51. In the American cases there was distinct evidence of payment. *8 Johnston*, 439; *9 Mass.*, 524. In *11 Johnston*, 518, *Barclay* v. *Gooch* is referred to; there the principle laid down was that the note was payment when negotiated. *5 Johnston*, 68, and *9 Johnston*, 310, clearly show that the note must be given and received in extinguishment of the debt; it must also be a negotiable note. This note was not a negotiable note, it is only shown to be a valid note. A note may be valid without negotiability. To determine whether a note is payment or not, the test is that during the currency of the note the remedies of the person taking it are not only suspended but entirely extinguished, and that he has no remedy except upon the note so taken; if he has any remedy otherwise it is not a payment. Now the policy here acknowledges, not the payment of the premium, but acceptance of a note, and it distinctly provides that the note shall not be considered a payment of the premium, because it provides, first, for setting off the note in the event of loss, and, secondly, that, if the maker becomes insolvent, the company can cancel the policy. The policy, therefore, shows that the note is not received as payment; it reserves remedies which could not be reserved if the note was a payment. If it were taken in payment, and were, for instance, a six months note, in the event of a loss happening in three months, they could not offset, but must pay the loss, and wait till the maturity of the note to recover. The plaintiff in the action had to go and guarantee the note. It could not then have been a payment. If it had

been a payment they could not demand any further security. In the English form of policy, as given by Arnould, these remedies contained in this policy are not reserved.

From the contention of the other side, arising out of the recital in the policy, it follows that if the company had received nothing at all from Payzant he would still be at liberty to sue for contribution. If the estoppel of the company as against Blenkhorn, is enough to enable Payzant to bring an action against Blenkhorn, it would inure all the same if he had paid nothing. But how could the defendant in this case get the benefit of it without a plea. The estoppel of the covenantor cannot regulate the rights of the covenantees among themselves. There is no evidence here of any authority of the ship's husband to insure. The only contention as to evidence of that is that the Insurance Act was ratified, and that is defective.

The Judge below does not find that this was accepted as payment, and there is no evidence of that, as there must be conclusive evidence; nor is there evidence that defendant was an owner of this number of shares. Unless they can show that he was an owner of this number of shares, the measure of damages could not be established. The only evidence is a certificate of registry; the date is the date of the trial, while the insurance was long previous. There is no evidence to show what his interest was at the time of the insurance. There is a supplementary certificate of Mr. O'Brien which could not be received in evidence at all. *8 M. & W.*, 212, deals with the question of estoppel and shows that the deed does not estop even the parties to it in matters collateral to the deed. If the statement in the policy is relied upon as evidence, it is not evidence at all, because it is not sworn; but even if it is evidence it is completely met by other evidence. If it is not an estoppel it can be contradicted, and they have contradicted it. *11 U. C., Q. B.*, 322.

RIGBY, J., (November 9th, 1882,) delivered the judgment of the Court:—

This was an appeal from the County Court for District No. 4. The judgment below was in favor of plaintiff for defendant's proportion of a premium of insurance on a policy

issued by the Avon Marine Insurance Company, on the barque "Calcutta," of which defendant was a part-owner. The insurance was effected by William H. Payzant, ship's husband, and also a part-owner, for himself and the other owners, and by their authority, in his own name, "on account of whom it may concern." For the whole premium he gave his promissory note to the company, and, having subsequently become insolvent, his estate was transferred by the assignee, under the provisions of *The Insolvent Act of 1875*, to the plaintiff, who had become the purchaser thereof for the sum of seven cents on the dollar on the legal liabilities of the insolvent; and as such assignee he brought this action, the declaration claiming the sum in question to be due "for money paid" by the insolvent for the defendant, at his request. The promissory note referred to was never paid, nor any part of the premium, otherwise than by the giving of such promissory note. Upon these facts we would have no hesitation in holding that plaintiff had not made out the allegation in his declaration of money having been paid by the insolvent for the plaintiff, if no English decision stood in the way. In *Espinasse's Reports*, Vol. II., p. 571, a case is however reported of *Barclay et al.* v. *Gooch*, which would seem to be an authority in support of this action. The plaintiffs were brewers and the defendant was a publican who rented one of their houses, at which a benefit club was held; the members of the club, distrusting the credit of Gooch, (the then landlord,) the plaintiffs became his security for the amount of the subscription money contained in the tax, which amounted to £50. Gooch became insolvent, and the club called upon the plaintiffs for the money, as his security, and took their note of hand for it, payable with interest. Lord KENYON is reported to have held in an action of *assumpsit*, tried before him, and brought by plaintiffs to recover the £50 from defendant, as money paid to his use, that the club having consented to take the note from the plaintiffs, it was as payment to them of the money due by the defendant; "it was payment of money to his use, and so the action was maintainable." The reporter says that in the next term a new trial was moved for, but the Court agreed with his Lordship and refused a rule. According to the head note to this case as so reported, it is necessary that the promissory

note, to have the effect referred to, should be *accepted as payment* by the creditor. Six years afterwards the case of *Taylor* v. *Higgins* was decided in the Kings Bench, 3 East., 169, and there it was held that "one who became surety for the defendant before his discharge under an insolvent debtor's act, and was afterwards obliged to give a new security of a bond and warrant of attorney, &c., for the old debt, cannot thereon hold the defendant to bail, by an affidavit as for so much *money paid to his use*," and *Barclay* v. *Gooch* was cited against such a conclusion. Lord ELLENBOROUGH, after consulting with the other Judges, said: "There is no pretence for considering the giving this new security as so much *money paid* for the defendant's use. Supposing even the case of the note of hand or bill of exchange, as the current representative of money, to have been rightly decided, still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money." A few years later the case of *Maxwell* v. *Jamieson*, 2 B. & Ald., 57, arose, in which one of the makers of a joint and several promissory note, after the same had become due, gave his bond to the holder for the amount; but before the action in which he sought, under a count for "money paid," to recover contribution from one of the other makers of the note, no money was actually paid on the bond. In giving judgment, BAYLEY, J. said, "The plaintiff in this case has paid no money. It is said indeed that he has given what was equivalent to it, and that it ought to be considered for this purpose as money, and so it was held in *Barclay et al.* v. *Gooch*. But in *Taylor* v. *Higgins*, the Court, having the former case before them, held that the action for money could not be maintained. *There are, therefore, at all events, conflicting authorities on this point, the last of which is in favor of defendant.* In *Taylor* v. *Higgins* the old bond was given up and the new one *accepted in satisfaction and payment* of the old debt." Then, having quoted the language of Lord ELLENBOROUGH in the latter suit, he proceeds: "Then *as the authorities differ*, it becomes necessary to look to the reason of the thing. No money has yet come out of the plaintiffs pocket, and *non constat* that any ever will; for if he recovers from the defendant in the present action, still it is possible that he may

never pay it over to Batson & Co., (the original creditors.) Then the period of time at which his remedy against the defendant shall commence, has not yet arrived. If, therefore, he is compelled to pay the money due upon the bond, he may then have his remedy against Jamieson for his contribution." HOLROYD, J. said, "I am of the same opinion. In order to support this action the debt must *have been extinguished*, either by an actual or a virtual payment of money, by the plaintiff to the defendants use. There has clearly been no actual payment; and in order to have made the giving of the bond operate as a virtual payment, *the defendant must be shewn to have been a party to that transaction;* which was not the case." *Power* v. *Butcher*, decided eleven years later, 10 B. & C., 329, arose out of the following facts: "An insurance broker effected on behalf of another person, a policy under seal with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorized, as agent or otherwise, to make assurance upon the vessel mentioned in the policy, and was desirous of making such insurance, had covenanted with the company to pay the premium, and then alleged that in consideration of the premises, and of such covenant, the policy was effected." Although it was decided in that case that the assignee of the broker, (who had become bankrupt,) could recover from the assured the amount of the premium, yet all the Judges concurred in holding that he could not do so upon the count for "money paid." *In Re London, &c., Banking Co.*, 34 Beav., 335, The Lord Chancellor said: "It is expressly laid down in *Williams' Saunders* that if a bill be taken on account of a debt, and nothing be said at the time, the original debt still remains, but the remedy for it is suspended. The cases of *Kearslake* v. *Morgan*, 5 T. R., 513; *Packford* v. *Maxwell*, 6 T. R., 53; *Tapley* v. *Martin*, 8 T. R., 451; *Stedman* v. *Gooch*, 1 Esp., N. P., 5; *Atkinson* v. *Hawdon*, 2 Ad. & El., 628; all establish that unless the bill is accepted under an agreement that it should *be a discharge of the debt*, if the bill does not turn out to be productive, the original debt remains in full force, although all right for suing for such debt is suspended until it be ascertained whether such bill is or is not productive." He then refers with approval to

the judgment of Lord LANGDALE, in *Sager* v. *Wagstaff*, 5 Beav., 423, where he says, "The debt may be considered as actually paid, if the creditor, at the time of receiving the note, *has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid*, or if from the conduct of the creditor, or the special circumstances of the case, such an agreement is legally to be implied."

On turning to the decisions of the Courts of the United States on this subject, I find WILDE, J., in giving judgment in the case of *Cornwall* v. *Gould*, 4 Pick., 444, speaks of *Barclay* v. *Gooch* as having been confirmed by a similar decision in New York in the case of *Witherbee* v. *Mann*, 11 John's Rep., 518, and mentioned with approbation in *Douglass* v. *Moody et al.*, 9 Mass., 553. In the case of *Witherbee* v. *Mann* there was express and conclusive evidence that the promissory note had been received in satisfaction and discharge of the debt, to recover contribution for which the action had been brought; and in *Douglass* v. *Moody et al.* a distinction was drawn by SEWALL, J., who delivered the judgment of the Court, between that case and *Barclay* v. *Gooch*. He says: "The case at bar will be perceived to differ, especially in this respect, from the case of *Barclay* v. *Gooch*, cited in the argument. There a note *given in discharge of a previous debt and so accepted*, was considered as money paid by the plaintiff in the action, who gave the note by which the debt of the defendant had been fully discharged, and proof that the debt had been paid was not required. The discharge of the previous debt was decided by Lord KENYON to be all that was essential. We see no reason to doubt the justice or authority of that decision, but it does not apply in the case at bar, where the bill of exchange is the original debt, and all that the plaintiff can demand is in the nature of an indemnity for a debt incurred in part for the benefit of others." In *Thornton* v. *Payne*, 5 John, 72, it was held to be "a rule well settled and repeatedly recognized in this Court, that taking a note either of the debtor or of a third person for a pre-existing debt, is no payment, *unless it be expressly agreed to take the note in payment and to run the risk of its being paid;* or unless the creditor parts with the note, or is guilty of laches in not presenting it in due time." *Tobey* v. *Barber*, 5 John's

Reps., 68, and *Johnston* v. *Weed et al*, 9 John's Reps., 310, are decisions to a similar effect.

In the case before us we might be reasonably asked to conclude, as BAYLEY, J. did in *Maxwell* v. *Jamieson*, that as the decisions in *Taylor* v. *Higgins* and *Barclay* v. *Gooch* were conflicting, and looking at the reason of the thing, we must follow the decision in the latter case, or hold with HOLROYD, J., in the same case, that there had been no virtual payment here, because the defendant had not been shewn to be a party to the transaction by which the note was given for the premium, or draw the distinction between the case at bar and *Barclay* v. *Gooch*, which was made in *Douglass* v. *Moody*; that in this case the promissory note was really the original debt, and was not given in discharge of a pre-existing one due by defendant as in *Barclay* v. *Gooch*. But it seems to me that whatever view we might take of the binding authority of the latter case, *this* must be apparent from all the decisions: that to enable the plaintiff to recover as for "money paid," he must prove that the promissory note had been accepted by the company in satisfaction and discharge of the premium to the same extent as if there had been actual payment; that the creditor had taken upon himself the risk of the note being paid, and that defendant's liability had become extinguished. The learned Judge of the County Court may be right in holding that the note, *as regards the Insurance Company*, must be considered as payment; but that is not the question to be decided. The acknowledgment in the policy of the receipt of the premium might estop the company from denying such receipt, but can have no such effect as between the parties to this suit, it is nothing more than a portion of the evidence to be considered in deciding this question of fact: has the plaintiff proved such a payment of the premium as to entitle him to recover contribution from the defendant, under a count for money paid, within the rule to which I have just adverted? I think he has not. According to the terms of the policy, in case of the loss, not only the amount of the note in question could be deducted from the amount insured, a portion of which would be payable to defendant, but when Payzant became insolvent, if the note was not due, the company had power to cancel the policy, provided the

premium was not paid or secured to them within three days after notice of such intention given to the maker of the note, his assignee, or any person interested in the policy. No such results could follow if the payment set up here was equivalent to an actual payment, and I do not see how it can be seriously contended that as between the parties to this suit, the note in question was given and received in satisfaction and discharge of the premium; that the defendants liability had been extinguished and that the Insurance Company had assumed the risk of the note being paid, in view of the stipulations in the policy to which I have just adverted.

I am of opinion that the judgment appealed from should be set aside and judgment entered below for defendant with costs.

CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM

DECEMBER 1882—1883.

IN RE APPEAL STEPHEN SWEET.

(Before WEATHERBE, RIGBY, and THOMPSON, J J.)

(Decided December 14th, 1882.)

Appeal from Commissioner of Mines.—Cross-examination of witness having been stopped.—Party aggrieved.—In Re Spelman *distinguished.*

ONE of several applicants for a mining area produced evidence at the hearing before the Commissioner of Mines to prove that he was the first applicant. In the course of the investigation a witness against the appellant was examined, and while he was being cross examined on a subject of importance in the inquiry, his cross-examination was stopped by the Commissioner.

Held, That this was sufficient ground on which to sustain the appeal, and that the appellant was a party aggrieved; the case differing from the case *In Re Spelman*, in that there the applications were simultaneous.

Per RIGBY, J.—Costs do not follow, as a matter of course, in such cases, but should be given in such a case as the present.

Per WEATHERBE, J.—Costs of the appeal follow, as a matter of course.

This was an appeal from a decision of the Commissioner of Works and Mines for the Province, awarding a lease of certain areas in Stormont Gold District to Alexander McDonald, to which the appellant claimed to be entitled as the first applicant therefor. An investigation was held by the Commissioner at his office for the purpose of hearing the parties, at which evidence was given as follows:—

Hugh Little sworn—I made an application for a lease in Stormont Gold District on behalf of Stephen Sweet. Produces the application marked A. S. C., which is put in evidence.

Tendered twelve dollars at the same time. Application made to Mr. Kelly in the Mines Office, at ten o'clock, a. m. Mr. Abbott made an application for a lease at the same time. Mr. McDonald made application for a lease on the same morning. Mr. Abbott's application was in first. My application was in next. Mr. Abbott's application was not for the same areas as mine was. I have no doubt that my application was the first made in the office that morning for the areas which I applied for. I have no doubt either that my application was made previous to Mr. McDonald's. Mr. Kelly said at the time that Mr. Abbott's application was the first made that morning. My application was refused.

In answer to Commissioner—I did not see Mr. McDonald make his application.

William Moody sworn, states—I was present in the Mines Office when the applications for the areas in dispute were made. Mr. Abbott and Mr. Little made applications for areas at the time. I saw Mr. McDonald there at the time. I did not see him make any application for areas. Mr. Abbott's application was first made; Mr. Little's next. It is not possible that Mr. McDonald's application could have been made before Mr. Little's. I saw afterwards three applications on the table, one of which I believe was Mr. McDonald's. Mr. Kelly said so. I saw Mr. Little tender twelve dollars with his application. The money was refused. I did not see Mr. McDonald's application put on the table at all. It was not on the table when Mr. Little's was made. I had my eyes on all parties, and was watching all the proceedings attentively all the time. The first time that I noticed Mr. McDonald's application was after Mr. Kelly put down the money, and application put in by Little. Mr. Kelly moved the papers around a little, and said this (picking up a paper) is first. Mr. Little handed the money to Mr. Kelly, and placed the application on the table.

John Kelly, Deputy Commissioner of Mines, in reference to the priority of the applications, said—On the first stroke of the clock, all the applications were placed on the table, there being an appreciable time between their being placed on the table, distinguished by the sound of each applicants hand as it struck the table with the application, McDonald's

being first, Abbott's second, and Little's third. And there being a greater length of time elapsed between McDonald's and Abbott's than between Abbott's and Little's. Little did not place the money on the table at the time when he placed his application, but threw it on the table afterwards.

The evidence of the Deputy Commissioner was objected to on the ground that at the time the applications were made he had decided that that of McDonald was first in point of time.

On the day following the investigation McDonald appeared at the office of the Commissioner and made a request to have his testimony taken, alleging that he had been unavoidably detained on the previous day. The Commissioner agreed to take the evidence on condition that McDonald should submit to cross-examination by Sweet's attorney, to which he assented. *Mr. J. J. Ritchie* attended on behalf of Sweet at the hour appointed and objected to the reception of further testimony, on the ground that the investigation had closed. The Commissioner having determined to receive the testimony.

Mr. Ritchie proposed, on cross-examination, to ask the following question, "Is there any other person interested in the applications for the areas with you?" The question was refused, and the Commissioner having come to the conclusion above stated, an appeal was taken from his decision on the following grounds:—

1. Because the said decision is against law and evidence, and against the weight of evidence.

2. Because the evidence of John Kelly should have been disregarded by the said Commissioner, inasmuch as he is contradicted by B. H. Eaton, J. H. Abbott, Hugh R. Little and William Moody, on the point as to which application for areas was made first on the said ninth day of July last.

3. Because the evidence of the said John Kelly should not have been received on said investigation, inasmuch as said Kelly, in his official capacity, had decided that McDonald's application was first, and that therefore it is not proper or competent for him to give evidence in support of the decision, and because he was interested in said decision being upheld.

4. Because the Commissioner erred in refusing to allow the question put to Alexander McDonald: "Is there any other person interested in the application for the areas in question with?" and because said question should have been allowed.

5. Because the said John Kelly had, previous to the investigation, improperly expressed his opinion to the Commissioner as to which application was first.

6. Because the Commissioner erred in allowing said Alexander McDonald to be examined after said investigation had been closed, and on a subsequent day.

7. Because the said Commissioner decided to receive the evidence of said Alexander McDonald after said investigation had been closed, and on a subsequent day, without hearing the said Stephen Sweet or his attorney in opposition to such evidence being received, and because the first knowledge which the said Stephen Sweet or his attorney had that said McDonald proposed to give evidence after the close of the investigation was a letter from said Commissioner stating that he had decided to admit such evidence.

J. J. Ritchie, in support of appeal.—If we had the right on the investigation to have an answer to the question ruled out by the Commissioner, we are parties aggrieved within the meaning of the Act. If Sweet's application was in previous to McDonald's, an appreciable portion of time, as is sworn by Moody and others, and Kelly, disregarding the former, accepted the latter application, Sweet would be a party aggrieved for that reason. McDonald's evidence was improperly taken after the close of the investigation. Shutting out the evidence of McDonald, so taken, and the evidence of Kelly, the remaining evidence is all in favor of Sweet. (WEATHERBE, J.—The legislature has said that the precise time at which they are made must be marked on the applications. Can we take cognizance of any time that cannot be marked.) The evidence is that there was an appreciable interval of time.

Tupper was called upon, contra.—I do not concede that the Commissioner of Mines is in the position of the Judge of a Court, having recognized modes of procedure. There is no duty imposed upon him to proceed after notice, or to examine

witnesses under oath, or reduce evidence to writing. He may converse with any one who can give him information. He is clothed with judicial powers for certain purposes. (RIGBY, J. —He may take evidence. He did so in this case, and came to a decision, and, on an appeal, one of the grounds is that he refused certain evidence on which he should have come to another decision. Your proposition goes to the length that he could say he would only take evidence on the one side.) I believe it does. (THOMPSON, J.—I agree with *Mr. Tupper* that the Commissioner in this case is not so much a judicial, as a ministerial officer, distributing the Queen's bounty, and what we have to enquire into is, whether his decision was against natural justice, and not as to its regularity. I think that the appeal places us in his position.) Exactly. The Commissioner may obtain his information from any source he thinks proper. (WEATHERBE, J.—I venture to say that where the rights of property are to be adjudicated upon, in no case is it not a court. The Commissioner of Mines performs not only the ordinary functions of his office in distributing the mines of the Province in a certain way, but tries the rights of property of individuals acquired under the statute.) If the Commissioner was not bound to take evidence, but could satisfy himself by enquiry of a clerk, for instance, having commenced to take evidence, he could reject evidence, or refuse to allow questions. It is not shown that the appellant did anything to give him any standing in the Court. (*J. J. Ritchie.*—The payment of the money is admitted.) The application is to set aside the judgment on appeal. The only power of the Court is to try the case anew. On appeal, a cause is heard anew, unless otherwise by local legislation. *Abbott's Law Dictionary, Title "Appeal."* I also rely on the *Spelman* case. Independent of McDonald's evidence, the appellant's own evidence shows both parties to have been present with their money and their applications at the same time. The law does not contemplate such a thing as a scramble at the table.

WEATHERBE, J.—We are unanimously of opinion that the appeal must be sustained with costs. The case is distinguishable from *In re Spelman*, inasmuch as the Commissioner of

Mines there held that the applications were made simultaneously, and we thought he was right. Here the appellant produced evidence to show that his application was made first, and we think he is a party aggrieved, and has a right of appeal. With regard to the grounds on which the appeal is to be sustained it is not necessary to give an opinion, although I have a strong impression that, McDonald having been called on the understanding that he was to be cross-examined, his evidence was to be taken subject to the ordinary rules, and his cross-examination was improperly stopped on a subject of importance.

On December 23rd, *Tupper* moved to amend the rule allowing the appeal by striking out the words with costs. Afterwards (January 13th, 1883,) RIGBY, J., delivered judgment as follows:—

Mr. Tupper moved for an amendment of the rule in this case in regard to costs, on the ground that costs are not recoverable on appeal from a decision of the Commissioner of Mines. He was so far right that costs do not follow, as a matter of course; but we think the statute indicates an intention that costs shall be given in cases like this. The act requires the appellant to file a bond to pay costs, if not successful.

WEATHERBE, J.—My opinion is based on the enactment that in all appeal cases the costs of the appeal shall be added to the costs below. The costs, therefore, follow as a matter of course.

KEITH *v.* ANCHOR MARINE INSURANCE CO.*

(Before WEATHERBE, RIGBY and THOMPSON, J J.)

(Decided December 14th, 1882.)

This was an action on a policy of Marine Insurance, dated 22nd May, 1879, to recover the amount insured on the barque

* After the forme containing this case was in print it was discovered that opinions had been delivered by RIGBY and THOMPSON, J J., the originals of which had been mislaid. A note of the case, together with the opinions referred to will, if possible, be inserted at the end of the volume.

"Charley," at and from Cochin *via* Colombo and Alipey to New York. The cause was tried at Halifax in November, 1881, before WEATHERBE, J., with a jury. A verdict was found for plaintiff and a rule *nisi* granted to set the same aside. The ground chiefly relied on by the defendant company was that the plaintiff, who was mortgagee of forty-six sixty-fourth shares of the barque, had, on the 21st October, 1878, and prior to the effecting of the insurance, transferred his interest under the mortgage to the Bank of Nova Scotia in consideration of being allowed time on a draft due at the date of the transfer. On the trial of the cause a reassignment of the security to the plaintiff dated 17th August, 1880, about a month subsequent to the commencement of the action, was proved, put in and read without objection. The transfer of the mortgage was in the following form :—

I, the within-named John Keith, of Windsor, in consideration of the Bank of Nova Scotia giving me time on a debt of three thousand and sixteen 90-100 dollars now owing to them by me on a draft drawn by me on C. W. Berteaux, New York, and due to-day, hereby transfer to them the benefit of the within-written security. In witness whereof I have hereunto subscribed my name and affixed my seal this 21st day of October, one thousand eight hundred and seventy-eight.

(Sgd.) JOHN KEITH.

Executed by the above named John Keith in the presence of THOMAS FYSHE of Halifax.

The rule *nisi* now, (December 14th, 1882) came on for argument.

Henry, Q. C., in support of rule.—The plaintiff was not interested, having absolutely assigned his interest. The transfer from Keith to the Bank of Nova Scotia, after reciting, as consideration, the giving of time to the plaintiff on a debt, transfers to the Bank the plaintiff's mortgage in these terms, "I hereby transfer to them the benefit of the within-written security." The fact that the consideration is the giving of time for a debt which may be paid, does not make the transfer

any the less an absolute transfer. The probability may be that, it was intended as a security, but the legal inference is that in consideration of the forbearance, the plaintiff makes an absolute transfer to the bank. The Court cannot assume that the interest on the debt may not have been worth as much as the property transferred. The reassignment cannot affect the matter. That is merely the statement of the Bank of Nova Scotia, not a party to this suit. Had the plaintiff wished to make this document a mere mortgage and not a transfer, he would have to give affirmative evidence outside of the document; he would not have relied on the instrument itself. He has not given any evidence in this case to show that the transfer was not absolute. The plaintiff cannot recover on his own interest and he cannot avail himself of the interest of the Bank of Nova Scotia. The reassignment to the plaintiff by the bank was not made until a month after the writ was issued, and cannot help the plaintiff in this action. (RIGBY, J.—It may be evidence that the bank treated the transfer as a security, if that would be enough.) I think it must be regarded as a survey put in; it is not evidence of the truth of its contents, except as against the party signing it.

Meagher, Q. C., was called on, on the point as to interest. The transfer was a mere security, *Ward* v. *Beck*, 13 C. B., N. S., 668. By the *Banking Act of 1871*, sections 40 and 41, interests in shipping can only be taken by Banking Companies by way of security.

WEATHERBE, J.—We all concur in deciding that the rule *nisi* for a new trial must be discharged. I may say that the majority of the Court did not wish to call on counsel at all, but I am very glad that the argument has taken place. It strikes me that the statute settles the case; but it was settled in my mind before the statute was referred to. I thought that when the reassignment of that transfer was put in evidence and allowed to go to the jury, and a verdict was taken without any objection having been made at the time, it was too late afterwards to say that the date would show that it was made after the writ was issued. Therefore, I thought, on that point, that the rule *nisi* should be discharged. But, further, when I look at this transfer of the interest in

the vessel, I find that it is not in the form of the statute, and, inasmuch as the form which gave an absolute statutable transfer was not followed, I think, taking the whole words together, it was only a mortgage which left an interest in the party insured.

PARSONS *v.* MACLEAN.

(Before McDONALD, C. J., and SMITH, WEATHERBE, RIGBY and THOMPSON, JJ.)

(Decided December 16th, 1882.)

Attachment by assignee without notice sustained.

PLAINTIFF, as assignee of J. S. McD., to whom defendant was indebted, attached certain goods of the debtor. Chattle mortgagees sought to set aside plaintiff's attachment on the ground that the debt was not "justly due" and "payable" to plaintiff, as there had been no notice given by plaintiff under R. S., cap. 94, sec. 357.

Held, that notice was not necessary in order to enable plaintiff to attach.*

J. S. Macdonald made an assignment of his estate and effects to the plaintiff, for the benefit of his creditors. Among other debts covered by the assignment was one due from George Maclean. Within a week after the making of the assignment Maclean had a conversation with the plaintiff, in which he admitted the debt, and asked for time. Plaintiff, as assignee, subsequently attached certain goods and chattels belonging to Maclean, upon which the latter, previous to the attachment, had given a bill of sale to one Ann Maclean, and a mortgage to J. B. Duffus and others, which were not registered until after the attachment.

Sedgewick, Q. C., (with whom was Ritchie, Q. C.,) on the first day of term moved, on behalf of the parties claiming under the bill of sale and mortgage above referred to, to set aside the plaintiff's attachment on the following grounds:—

1st. No notice in writing was given by the plaintiff prior to the commencement of his action, pursuant to *Revised Statutes*, chapter 94, section 357. No action could be commenced by the assignee in his own name until after fourteen

* Some importance was attached to the fact that the defendant had admitted the debt to plaintiff, but the decision does not appear to have proceeded on that ground.

days' notice, and the sum demanded was, therefore, not "justly due," and not "payable when the action commenced."

Eaton, contra, contended that it was not shewn that Ann Maclean, one of the moving parties, was a creditor, inasmuch as the bill of sale was drawn payable one day after date, and it was not sworn that George Maclean had made default in the payment of it. The plaintiff's affidavit, on the other hand, shewed a debt due and immediately payable. It was further shewn that Maclean came to the plaintiff's office after he knew that he had become assignee, and stated an account with him. The account stated relieved the plaintiff of the necessity of giving the fourteen days' notice.

Ritchie, Q. C., replied.

THOMPSON, J., now (December 16th, 1882,) delivered the judgment of the Court:—

In this case the plaintiff issued a writ of attachment for a claim assigned to him by James S. Macdonald, before giving the notice required by the statute to enable the assignee of a chose in action to sue the debtor. The question was raised by mortgagees, who moved to set aside the plaintiff's attachment, whether the debt was due and payable within the meaning of the statute, *Revised Statutes*, chapter 94, section 357, and they contended that it was not, and that the statute must be read as if it contained the words "due and payable by the defendant *to the plaintiff*." I think that the statute cannot be read as if the words italicised were in it. In the case of *Robertson* v. *Cameron*, 2 R. & C., 261, the subsequent attacher applied to set aside an attachment on the ground that the debt was due jointly by the absent debtor against whom the attachment issued, and others who were not absent from the Province. The Court held that the objection was available only to the debtor himself by a plea in abatement and that it would be an abuse of the process of the Court to allow a subsequent attacher to raise that contention.

There are distinct authorities, which I need not read, for the position that the assent of the debtor to the assignment, and his promise to pay the assignee, are sufficient without any notice to entitle the plaintiff to maintain the action. They will be found in *10 Mass.*, 316; *12 Mass.*, 281; *7 Cushing*. 175

FELCH *v.* RITCHIE ET AL.

(Before McDONALD, SMITH, and WEATHERBE, J J.)

(Decided December 18th, 1882.)

Bond for performance of building contract.

In an action against the principal and sureties on a bond to the plaintiff for the payment of the cost of a house which the plaintiff was to build for the principal, it appeared that the work was not done in strict pursuance of the agreement and specifications. The plans referred to in the contract, and which were part of it, were not put in evidence. The person employed by the inspector named in the contract, who was to superintend the work, was superseded by another by plaintiff without the consent of the defendants.

Held, That plaintiff could only recover on a *quantum meruit*, and that, as there was not sufficient evidence to enable the jury to determine how far the contract had been departed from, and as the sureties could not be bound by the appointment of the new inspector, the verdict for plaintiff must be set aside.

This was an action on a bond to recover a balance claimed to be due on a building contract entered into between plaintiff and W. A. Ritchie, one of the defendants. The contract was for the erection of a dwelling house by plaintiff, in accordance with certain drawings and specifications, to be paid for by certain fixed payments, as the work progressed, and the balance on its completion. The payments agreed upon were secured by the bond, upon which the action was brought. The cause was tried at Annapolis in June, 1880, before WEATHERBE, J., with a jury, when a verdict was found for plaintiff for a part of the amount claimed, to set aside which a rule was granted, as against law and evidence; for the improper rejection of testimony; for the improper reception of testimony; because the said verdict was contrary to the charge of the learned Judge and was perverse, and upon the grounds taken at the trial and on the motion for a non-suit and for misdirection. The charge of the learned Judge was as follows :—

I said that, as I had already intimated in their hearing, I thought the plaintiff could not recover. Counsel had exercised his right to have the opinion of the jury, and I would submit two questions to them after explaining the principles on which they should proceed in finding their verdict. Apart from numerous legal questions with which the jury had nothing to do, and which had been discussed on motion for nonsuit, the issues of fact raised by the pleadings involved

the question whether the house had been constructed in accordance with the contract made between the plaintiff, Felch, and the defendant, Ritchie. The three defendants had executed a bond to the plaintiff for the performance by the defendant, Ritchie, of an agreement with plaintiff respecting the construction, and a material allegation in the declaration was the performance of the agreement on the part of plaintiff. What the plaintiff was to do, by the terms of the agreement, was to finish a house of the dimensions as shewn in certain plans, and according to the plans and specifications. The contract itself was in evidence with the specifications; but the plans referred to in the contract, and which formed a part of it, and upon which depended entirely the dimensions of the house as well as its general form and the shape of the different parts in detail, were not in evidence. No plans were tendered in evidence with the contract; and, though there was evidence that plans were prepared with the contract, and in existence at the time of its execution, there was no evidence as to what plans were before us. The evidence respecting certain plans, which I had marked, was that the house was built according to those plans; but to make them evidence it was necessary that it should appear that these were the plans referred to in the agreement. I read those parts of the agreement referring to the plans, and remarked that I considered their introduction material in the case to render defendant liable. Plaintiff claimed against all the defendants, and, to recover, must show that the house was of the dimensions and character required by the contract; the plaintiff had not, on his part, shown a compliance. Where there was a special agreement for the construction of a building and the work was not done pursuant to the agreement, the law permitted a plaintiff to recover upon a *quantum meruit*. In such cases the mode of arriving at the damages was to deduct from the price agreed on whatever would be required to complete the work according to the contract, and it was upon this principle that counsel had urged that the verdict should be arrived at here. I was at a loss to know how such a calculation could be made, without the plans and details required, by an examination of the contract itself. It appeared by the contract that the work was to be done under the direction of

Richards, or a person named by him. There was evidence that Foster had been named by Richards, and that afterwards, he had been superseded without the consent of the defendant Ritchie, and for this reason I was unable to see how the defendants, who were sureties, were to be made liable.

I pointed out to the jury the various departures from the contract, as shown by the evidence, and stated that in law it was impossible for the plaintiff to recover a verdict against those defendants in this suit, and, whatever might be the hardships, as depicted by counsel, I was unable to find anything, taking the whole case together, to guide them in reducing the amount, which it was admitted must be reduced. As plaintiff's counsel had considered it his duty to press for a verdict, I would, whether the jury were or were not disposed to be directed by the Court, submit two questions to them, so as to know what their views were on the points referred to.

The following are copies of the questions submitted :—

Has the house in question been constructed by plaintiff of the dimensions, and material, and character required by the contract between plaintiff and defendant, (Ritchie,) and agreeably to the drawings and specifications ?

Was Foster appointed as surveyor or inspector under the first clause of the agreement ?

To these questions the jury returned the following answers :—

We find that the house in question, so far as we can judge from the evidence, has been built substantially in accordance with the plans and specifications, with the exception of a few small deviations, for which he had the authority of the architect, and which we consider were sufficient.

We also find that Foster was appointed to act as sub-inspector under Richards.

The rule now came on for argument.

Graham, Q. C., in support of rule.—The plans and drawings were not put in at the trial with the contract, but were tendered without the execution being proved, and were rejected. The plans were a part of the contract, and were essential to the plaintiff's recovering. The money was not payable and the sureties were not liable until the building

was fully completed in accordance with the plans, drawings, &c. This could not be proved until these were put in. A contract must be literally fulfilled in order to bind sureties, *Whitcher* v. *Hall*, 5 B. & C., 269; the latter is cited as a leading case; *L. R.*, 3 Ex., 303; *Leake on Contracts*, 802. The verdict was perverse as being against the Judge's charge, *Ellis* v. *Hamlin*, 3 Taunt., 52.

Weeks, contra, cites *McIntosh* v. *Cullen*, 2 Oldright, 269. The action can be maintained where there has been a substantial compliance with the terms of the contract, and where there has been such substantial compliance the sureties are liable, as it is for the fulfilment of the contract that they became liable, *Addison on Contracts*, 547; *4 Scott*, 509; *3 Scott*, 755; *1 M. & R.*, 218. It is for the jury to say whether there has been substantial compliance or not, and they have found that there was. As to the sureties the principle is that they are not relieved by reason of more or less being done than the contract required. It is only where one agreement has been substituted for another, that the surety is relieved, *L. R.*, 3 Q. B. D., 495. There was no substituted agreement in this case, but merely a minute deviation from the contract. If the case is such that the plaintiff can recover on the contract from the principal, either for the whole amount, or for any less amount, (which he can do if there has been a substantial compliance on the part of the plaintiff,) then the plaintiff can recover from the sureties. If the alteration in the contract is material, the surety is discharged unless he consent to the alteration.

Graham, Q. C.—The evidence shows a very substantial deviation from the original contract. The floors were not according to contract; the roof was not properly finished; the glass is ordinary, instead of extra double French; the roof was to be warranted tight, but leaked; the paint was not of the kind contracted for; the door knobs were to be pressed glass, they were put in of the commonest description made; no tarred paper was put under the shingles of the roof. The bond here was not a common money bond, it was a bond conditioned for the performance of certain conditions contained in another instrument; it was a contract, and in setting out a contract you must set out the conditions prece-

dent. The contract was not set out; *2 Chitty on Pleadings*, p, 90, gives the form o a count on a bond. Our statute is clear that you must set out the conditions precedent, though you may aver performance generally. *Bullen & Leake*, p. 59 and p. 147; *Chitty on Pleadings*, p. 87. On the question of the liability of the sureties see *DeColyar*, 395. There must be a literal fulfilment of the contract to bind sureties where the contract is a part of the guarantee.

SMITH, J., now, (December 18th, 1882,) delivered the judgment of the Court:—

This is an action brought by plaintiff to recover from the defendants the sum of four thousand dollars, on a bond given by one William A. Ritchie, as principal, and William B. Troop and Joseph Foster, of Annapolis, as sureties, for the completion of a contract to build a certain house, by the said Felch, for the said Ritchie, under a contract entered into between them of date, May 29th, 1878. The condition of the said bond was declared to be, that if the said William A. Ritchie, his heirs, executors, or administrators should, in all things, perform the covenants and agreements on his part to be done and performed, and fully set forth and expressed in said contract in said bond referred to, then the said bond should be void. As a condition precedent to plaintiff's right to recover, it is averred in the declaration that he did perform, according to the terms of the agreement, all that on his part was to be done, but that the defendant failed, and made default in the payments agreed to be made under and by virtue of said agreement. The particulars of plaintiff's claim credit the sum of $3000, which is deducted from $6266, including extras charged, making $3266 due as claimed by plaintiff. The main defence set up by defendant's pleas is that the plaintiff did not strictly perform and keep the covenants and agreements in said contract, and did not well and sufficiently erect, finish and deliver the building, agreeably to the drawings and specifications mentioned in said agreement. The plaintiff also declared upon the common counts for work and labor, etc. This indebtedness is put in issue by defendant's pleas.

It seems to be very clear that that the work was not done in strict pursuance of the special agreement. It was at least incumbent on the plaintiff to show that the agreement on his part was carried out. The contract was put in evidence, it is true, with the specifications, but the plans which were referred to in, and were a part of the contract, were not put in. Without this evidence it was impossible to say whether the contract had been complied with as agreed upon. It appears from the Judge's minutes that certain plans were put in to show that the building was constructed according to those plans; but, as the learned Judge properly remarked in his charge, there was nothing to identify them as those referred to in the contract. It seems to have been admitted on the trial that the amount claimed by plaintiff must be reduced; if so, he could only recover on a *quantum meruit*. If the evidence was of such a character as to enable the Court and jury to apply the principles of law applicable to such a demand, it would be difficult to object to the verdict found for the plaintiff for $2500; but there seems to me an impossibility of ascertaining how the jury could reject the plaintiff's claim under the special agreement and find such an amount without the evidence necessary to shew how far the contract had been departed from according to the plans and details of the contract declared upon. We also think that the superseding of Foster by Richards without Ritchie's consent could not possibly bind the sureties.

I think the rule must be made absolute to set the verdict aside with costs.

IN RE. FREDERICK B. K. MARTER.

Before McDONALD, C. J., and SMITH, JAMES and WEATHERBE, JJ.

(Decided December 18th, 1882.)

Insolvent Act of 1875.—No lien for City taxes.

THE City of Halifax has no preferential claim for taxes against the assignee under the Insolvent Act of 1875.

In this case the City of Halifax claimed to be paid in full the amount of taxes due by the insolvent, Marter, who had

been put in insolvency by a writ of attachment. Objections were filed to the claim as follows:—

The insolvent objects to the Claimant ranking in full, and to his receiving a larger composition than the other creditors, upon the following grounds:—

1. Because the chapter 81, of the Acts of the Legislature of Nova Scotia for 1864, in so far as the same relates to insolvent traders, is and was repealed by the provisions of the Statutes of Canada in force respecting insolvency.

2. Because the Statutes of Canada in force respecting insolvency at the time said claim arose, did not give the City of Halifax the right to rank in full, or for more proportionately than any other creditor; and the Acts of the Legislature of Nova Scotia for 1864 were and are in effect repealed, in so far as they were intended to give any preferences in payment not provided by the said Statutes of Canada.

3. Because the Acts of the Legislature of Nova Scotia for 1864 did not, and, if in force, do not give the claimant any preference, or any right to claim in full, where the property of the person assessed is taken under and by virtue of a writ of attachment issued under the provisions of the Statute of Canada in force respecting insolvency.

B. RUSSELL,
Attorney for Insolvent Contestant.

JOHNSTON, J., after argument, delivered the following judgment:—

In the contestation in this matter, the question for adjudication is whether the City of Halifax has a claim for taxes on the estate of the insolvent preferential, or whether the City must rank on the estate and take the dividend as in the case of unpreferenced or unsecured creditors. The City of Halifax claims a lien on the estate under section 342 of the Acts of 1864, City Charter, which provides that no property of any party shall be liable to be taken by virtue of any assignment, &c., unless the party who holds the assignment, &c., shall pay the City rates for the current year before taking into possession the property so assigned. The English Bankrupt Acts make parochial or other local rates to be paid in

priority to all other debts, providing for an abatement, in a certain event, between them and other preferential debts, and the United States Bankrupt Law, in like manner, declares that all taxes and appraisements under the laws of the United States shall be entitled to priority and to be first paid in full. The Canadian Insolvent Act creates no such lien, and therefore the question must be decided on general principles. The object of the Insolvent Act, which is a public act, is the equal distribution of the estate of the insolvent among all his creditors in rateable proportions, and the only privileged claims to be paid in full are the landlord's claim for rent and the wages of clerks, &c., under certain circumstances and to a a limited amount. Section 83 of the Act declares that no lien or privilege upon the real or personal estate of the insolvent shall be created for the amount of any judgment debt by the issuing or delivery of the writ to the Sheriff, or by his levy thereunder, provided that the estate has been assigned or that process of liquidation had been adopted and was still pending before the money had been paid over to the plaintiff. This destroyed, as against the assignee, the priority and lien of the judgment creditor created under the local acts of the Province. The issue of a writ of attachment vests absolutely in the assignee all the estate, real and personal, of the insolvent. I do not think that the assignment in the clause in the City Charter to which I have referred, and on which they base their claim, refers to assignments made under the provisions of the Insolvent Act, or that it can be construed so as to be a lien on the property vesting in an Official Assignee by virtue of a writ of attachment. I rather think that the assignment referred to is a transfer of property between private individuals, and that the claim was intended to be of similar import to section 87 of the General Assessment Act of the Province, where property transferred or taken under execution is first made liable for the assessment due and payable thereon. Again, I think that the above clause in the City Charter is, as regards insolvent estates, repealed, as being inconsistent with the spirit and object of the Insolvent Act, which, as I before stated, is the equal distribution of the estate among all the creditors in rateable proportions, subject only to the exceptions in, and the liens created by that statute;

and here, I think, the case of the *Central Gas Consumers' Company* v. *Clarke*, 11 C. B., N. S., 838, is in point. BYLES, J., stated the rule to be, that, though in the subsequent act the prior act is not expressly mentioned, the prior act is repealed if there be an invincible contrariety or repugnancy between the two. The judgment was affirmed on appeal, *13 C. B., N. S.*, 837, where POLLOCK, C. B., said, although that section is not in terms repealed, yet it becomes in a private act quite inconsistent with a clause in a subsequent public act that is sufficient to get rid of the clause in the private act. But, irrespective of this, section 140 of the Insolvent Act repeals all acts and parts of acts in force in any of the Provinces to which that act applies which are inconsistent with that act. I think it is impossible successfully to contend that the clause in the City Charter is not inconsistent with the provisions of the Insolvent Act, and therefore I am of opinion that the City of Halifax has no lien or privileged claim against the estate of the insolvent, but must rank on the estate as any other unsecured creditor.

The City appealed from this decision and the appeal was argued by *J. N. Ritchie, Q. C.*, for appellant, *Russell*, contra.

JAMES, J., now, (December 18th, 1882), delivered judgment as follows:—

F. B. Marter being insolvent under the Act of 1875, the City of Halifax filed a claim against the estate for $143.17, "for city, county, poor, school and water rates," which, in their claim, they demand shall be paid in full as a preferential claim under the provisions of chapter 81 of the Acts of the Legislature of Nova Scotia for 1864. Section 341 of that statute makes the personal property of all persons assessed under the Act for city rates, liable for the full amount of rates due, "notwithstanding any assignments or other conveyances" made by the owner of such property, &c. The insolvent objected to the claim being allowed in full, *inter alia*:—

1. Because the chapter 81 of the Acts of Nova Scotia for 1864, in so far as relates to insolvent traders, is and was repealed by the provisions of the statutes of Canada in force respecting insolvency.

2. Because the statutes of Canada in force respecting insolvency at the time said claim arose did not give the City of Halifax the right to rank in full or for more proportionately than any other creditors; and the acts of the Legislature of Nova Scotia for 1864, were and are in effect repealed, in so far as they were intended to give any preferences in payment not provided by the said statutes of Canada.

The claim to be paid the whole amount due the city for taxes was contested before the Judge in Insolvency, who decided against the lien of the city for a privileged claim against the estate, and held that the city must rank on the estate as any other unsecured creditor. From this decision the City of Halifax appealed, and the appeal was argued before us on the 21st December last. By the B. N. A. Act, section 91, sub-section 21, "Bankruptcy and Insolvency" are specified as subjects of legislation exclusively within the jurisdiction of the Dominion Parliament, and that parliament enacted in 1869 "an Act respecting Insolvency," sec. 154 of which, after specifying certain already existing legislation in some of the provinces which it expressly repeals, goes on to say; "And all other acts and parts of acts now in force in any of the said Provinces which are inconsistent with the provisions hereof, are also hereby repealed." This legislation was repeated in the Insolvent Act of 1875, sec. 149, in the same words. The only question which we have to decide is whether the enactment in section 341 of the Provincial Act of 1864, chapter 81, which I have referred to, is inconsistent with the Insolvent Act of 1875. If it is, it is clearly repealed by the B. N. A. Act. Whatever validity may appertain to any portion of our Insolvent Debtors Act, as it existed before the passing of the B. N. A. Act, which has not since been repealed by our Legislature, it is not necessary here to inquire; and it would be injudicious to do so further than is absolutely necessary to determine the case before us. Sir Montague SMITH, in delivering the judgment of the Privy Council in *Citizens Insurance Company* v. *Parsons*, Law Reports, Appeal Cases, Part 1., April 1., p. 108 says: "With regard to certain classes of subjects, therefore, generally described in section 91, legislative power may reside as to some matters falling within the general description of these subjects, in the Legislatures

of the Provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define *in the particular case* before them the limits of their respective powers." * * * "In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide *each case* as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand." Acting on this judicious and almost authoritative advice, it appears to me that the question I have stated, viz., is the section which gives the city a preferential lien inconsistent with the provisions of the Insolvent Act, admits of but one answer. The general principle of the latter is that the whole of the real and personal property of the insolvent shall be distributed rateably among his creditors in proportion to the amount due to them severally, in favor of certain debts which are to be paid in full. Some exceptions there are which are provided for in the statute, but the payment of taxes is not one of these, as in the Imperial Act, 32 & 33 Vic., chap. 71, sec. 32; and if the section which gives the city a lien for taxes is not repealed by the Insolvent Act I do not see what meaning we can give to its words. The case of *Almon et al* v. *Gray et al*, Ritchie's Equity Decisions, 6, was decided on this principle against the lien of attaching creditors under the Absconding Debtors Act, and I fail to see any reason why the City of Halifax should be in any better position than any private creditor who had obtained a lien under the operation of a statute existing prior to 1869. The same decision was given in a similar case by this Court in *Rumsay* v. *Hare*, 3 R. & C., 9. The case of *Murdoch* v. *Welsh*, was cited at the argument, in which the Court upheld a lien created by a recorded judgment as valid to bind the real estate of the insolvent against the official assignee under the Insolvent Act of 1869. This case has not been reported, but has several times been referred to in arguments before us, and I have always understood that it was so decided mainly, if not entirely, upon the ground that sec. 25 of chap. 19, *Revised Statutes*, says expressly that "a judgment duly recovered and docketted shall bind the lands of the

party against whom it shall have passed * * *as effectually as a mortgage.*" Under this clause judgments had been commonly entered and recorded to bind lands as security for money lent, &c., and a recorded judgment had, under this legislation, been for half a century used as one of the common assurances of the country; and an opposite decision to that at which the Court arrived would have shaken the title to real estate in a multitude of cases to the prejudice of parties who had invested their money on the security of recorded judgments, relying on the protection thus expressly given to them as mortgages by the statute. So important a distinction between that case and the case before us prevents it from serving as a precedent in opposition to the plain words of the statute and in opposition to the construction which has been put upon it by the two reported decisions I have referred to.

I am of opinion that the appeal should be dismissed with cost.

I have also referred to the following cases cited on the argument: *Queen* v. *Roberts*, L. R., 9, Q. B, 77; *Hilton* v. *Jones*, L. R., 9, Ch. Div., 620; *Mayor* v. *McLeod*, 1 B. & P., 423.

MCDONALD, C. J., delivered the following dissenting opinion:—

I regret that I am obliged to dissent from the decision just read. I only had the opportunity of seeing the opinion of Judge JAMES on Saturday, and I have therefore had no opportunity of committing my own views to writing. I of course express my opinion with diffidence, standing as it does, in opposition to those of my learned brethren; but, having carefully considered the subject, I am bound to give expression to the views I entertain. I differ from the decision just read on both points. The Act of 1864, under which the lien claimed by the City of Halifax is sought to be enforced, was passed by a competent legislature, before the union of the Provinces under the British North America Act, so that a question of conflict of authority cannot arise. In 1864 the legislature of this Province had full power to make the wise, natural, and proper provisions for the protection of the public interests in regard to the assessment of property, which they then made. The words in that Act, in my opinion, cover all

the modes by which a party could divest himself of property made liable by the Act, they are as follows:—"The personal property of all persons assessed under this Act for city rates shall be liable for the full amount of rates due, notwithstanding any assignment or other conveyance made by the owner of such property, or of any judgment entered against the owner thereof, or any execution issued to bind the property." Up to the time of the passage of the Insolvent Act of 1869 there can be no doubt that the claim of lien existed and could be enforced, and it continued to exist and be enforceable after that date unless it was divested by the words used in that Act. It appears to me that it is misconstruing the intention of the Dominion Parliament to say that without expressly repealing the lien created by the Act of 1864 they could, by the use of words not apparently intended to operate in that way, destroy that lien. I do not think Parliament so intended, and I cannot therefore assent to the judgments delivered on that point. I am equally unable to concur in the view that the Act of 1864 was inconsistent with and was consequently repealed by the Act of 1869; unless there was an entire and manifest inconsistency the Act of 1864 is still in force. In the first place the object of the Act of 1869 was to secure an equal distribution of the assets of an insolvent among his creditors. The relation of debtor and creditor did not exist between the city and the person upon whom the assessment was levied; the terms and sense of the act did not create such a relation, and it is impossible that the legislature could have ever intended that such a relation should exist. The Insolvent Act defines a creditor under that Act to be "every person, copartnership or company to whom the insolvent is liable." The City of Halifax is neither a company, a copartnership, nor a person, and, although the Interpretation Act declares that the word "person" shall include any body corporate and politic, I think that section applies only to business, and not to civic corporations. But there is another reason; it will not be disputed that the taxes are imposed, not for the individual benefit of any person, but in the public interest, for the maintenance of public institutions and the carrying on of the civic government. They cannot be made subject to a writ of execution. Although money

collected and in the City Treasury is liable for the debts of the city, taxes levied by virtue of law cannot be intercepted on their way to the City Treasury by any lien or process of law, because, as between the rate-payer and the city, the relation of debtor and creditor does not exist; the money due from the rate-payer is available to the creditor of the city only when it comes into the treasury. Another reason why the relation of debtor and creditor cannot exist is that the law says the rate shall be imposed upon the citizens *and property within* the City of Halifax. The rate is for the payment of obligations incurred by the corporation on the security that the money assessed shall be received by them and applied towards the discharge of those obligations, and I think it would be a serious blow at the competency of public bodies to discharge their duties if the lien were removed. I think the existence of such a lien is entirely consistent with the Act of 1875, and that no express language has been used in that Act to repeal it. I am therefore of opinion that the lien contended for should be sustained and the judgment below reversed.

TOWN OF WINDSOR *v.* THE COMMERCIAL BANK OF WINDSOR.

(Before McDONALD, SMITH, JAMES and WEATHERBE, J J.)

(Decided December 18th, 1882.)

Taxation of Banks.—Dominion notes held as reserve assessable.

THE Local Legislature has authority to enact a law imposing a tax on the Dominion notes held by a bank as portion of its cash reserve, under the Dominion Act relating to "Banks and Banking," (34 Vic., c 5, s. 14,) and under the by-laws of the Town of Windsor, such property was held to be properly included by the assessors in their valuation.

This was a case stated for the opinion of the Court in the following terms:—

The parties hereto agree to submit the following case, without pleadings, to the Supreme Court at Halifax, for their decision thereon, and agree to be bound by the decision given herein by the said Supreme Court.

The defendant Bank is doing business under the general Banking Act of the Dominion of Canada, and has its office, and does business in the Town of Windsor.

The bank, in addition to real and other personal property held and owned by it, owns and holds notes of the Dominion of Canada to the amount of eleven thousand seven hundred and fifty-nine dollars, which notes are held as a portion of its cash reserve, as required by the Act relating to Banks and Banking.

The assessors for the Town of Windsor have assessed the said bank the sum of twelve hundred and fifty dollars on real estate, fifteen hundred dollars on office furniture and safes, eighteen thousand two hundred and forty-one dollars on specie held by the said bank, and, also, eleven thousand seven hundred and fifty-nine dollars on said Dominion of Canada notes, being the amount of said notes so held by said bank, and the said bank has been rated the sum of three hundred and twenty-seven dollars and fifty cents for taxes thereon.

The bank is willing to pay the taxes rated and assessed on it in respect of real estate, office furniture, and safes and specie held by it, viz.: the sum of two hundred and nine dollars and ninety-one cents, but refuses to pay the tax rated and assessed on said Dominion of Canada notes, viz.: the sum of one hundred and seventeen dollars and fifty-nine cents.

The question for the opinion of the Court is, whether or not the said bank is liable to be so assessed for taxes on the Dominion of Canada notes so held by the said bank.

If the Court decide that the bank is liable to be assessed on said Dominion of Canada notes, judgment to be entered against the defendant for the plaintiff for the sum of one hundred and seventeen dollars and fifty-nine cents, and costs, otherwise judgment to be entered for the defendant against the plaintiff for costs.

It is further agreed that this case shall not stay or interfere with the collection of rates and taxes assessed and levied on other property held by the said bank, and the payment by the said bank of any sum or sums of money on account of its taxes shall not affect or prejudice this case.

The printed Bye-laws of the Town of Windsor may be referred to as if forming part of this case.

E. W. DIMOCK,
Warden.

W. M. CHRISTIE,
Atty. for Town of Windsor.

WALTER LAWSON,
Cashier Com. Bank of Windsor.

AUBREY BLANCHARD,
Atty. of Com. Bank of Windsor.

The case was argued December 19th, 1881, by *Graham, Q. C.*, on behalf of the town of Windsor, and by *Rigby, Q. C.*, on behalf of the Commercial Bank.

Graham, Q. C.—The question is simply whether the Municipality of Windsor can tax Dominion notes in the bank. The Act of Incorporation enables the town to make by-laws in relation to assessment, and a by-law has been made in pursuance of the act. These notes are assessable as other property; *Re Assessment Bank of Nova Scotia*, 3 R. & C., 32; *Re Assessment Bank of Yarmouth*, 2 Nova Scotia Decisions 308. In the latter case notes of hand were held not to be included in the term chattels; the former case went further and decided that promissory notes could be assessed. (*Rigby, Q. C.*—That question was never argued, and was not before the Court.) At all events the principle is clear that money and notes can be assessed. (*Rigby, Q. C.*—*In Re Assessment Bank of Nova Scotia* there was a motion to set aside the *certiorari*, and cases were cited on that point. Some time after, the ex-Chief Justice came in and delivered a judgment on the question of assessment, how much it should be, and all about it.) Under the British North America Act Dominion notes in the hands of parties may be assessed. The first act in reference to Dominion notes is the act of 1868, page 46; the next is the act of 1870, page 40; and the last, the act of 1880, chapter 13. There are some other acts, which are not material. The Banking Act is contained in Acts of 1871, chapter 5, sections 11, 14. Under section 125 of the B. N. A. Act, no lands or property belonging to the Dominion can be taxed. It cannot be said that these notes which the Dominion Government have exchanged for gold and other things belong

to the Dominion Government. *Bank* v. *Supervisors*, 7 Wallace's Reports, 26. In this case United States notes were held exempt from taxation, but this was under a special act to that effect, and may be inferred from the case that if it had not been for this act the notes would have been taxable as money. In *Burroughs on Taxation*, 120, a great many of the United States cases are discussed.

Rigby, Q. C., contra.—Cites *B. N. A. Act*, sec. 91, as to the exclusive powers of the Dominion Parliament. Sub-section 15 enumerates, among these subjects, "banking," the "incorporation of banks," and the "issue of paper money." Under this the Dominion Government have passed a Banking Act, under which a portion of the capital of each bank is tied up. They say the banks must keep in their vaults a certain portion of their capital, half of which must be in Dominion notes. If you concede the right of the Local Legislature to tax this, there is no limit to the extent to which it may do so, and it may so hamper the operations of the banks as to prevent them from carrying on their business. Such a power would be inconsistent with that possessed by the Dominion Parliament. *Doutre on Constitution of Canada*, 393. Under section 91, B. N. A. Act, I contend that the Dominion Government, having exclusive power, the Local Legislature cannot impose a tax on the means used by them for the purpose of carrying on their operations. The legislation by the Dominion Parliament, that the banks shall keep a reserve of 20 per cent., is inconsistent with any right of the town to impose a tax on that reserve. I also take the general ground that this is a tax on the borrowing power of the Dominion, which is one of the means of carrying on business. (WEATHERBE, J.—I do not see where you can draw the line. According to your contention, the Local Government would have no power of taxation at all.) I do not need to go that far. (WEATHERBE, J.—I think you must go that length.) I do not think so. In *40 U. C., Q. B.*, 478, and, on appeal, in *2 Ont. Appeals*, 522, the principle laid down in the United States cases was recognized. In this case it was held that the income of a civil servant of the Dominion Government was not liable to taxation under local acts. *McCulloch* v. *Maryland*, 4 Wheaton, 316, goes

fully into the whole question. *Desdelens* v. *Commissioners Erie County*, 16 Peters, 443; *Weston et al* v. *Council of Charlestown*, 2 Peters, 449. In this case it was held that a tax could not be levied on stock of the United States held by an individual. See on same point, *2 Black's U. S. Reps.*, 620; *9 Wheaton*, 738; *2 Wallace*, 200. The latter case is much like the present. *Sedgewick on Statutes*, 507, note.

Graham, Q. C.—Those were cases where the banks were discriminated against in the taxation. *McCulloch* v. *Maryland*, is the leading case. It was sought to apply a special rule to the banks from that which was applied to individuals. The Dominion Government can refuse their assent to any act imposing a tax which would destroy a bank. If the Dominion Government have the right to say that the notes shall not be taxed, they have not exercised it. There can be no objection to a tax on these Dominion notes, provided a greater tax is not imposed on them than on other moneys. The fact of this being a reserve fund may add a little moral force to the argument, but there is no legal distinction between this money and any other. If the notes were not there the bank would have to have gold. *2 Wallace*, 244; *9 Wallace*, 361; *2 American Reps.*, 327.

WEATHERBE, J., now, (December 18th, 1882,) delivered the judgment of the Court:—

The liability to pay the assessment in question depends upon the interpretation of the clauses of the British North America Act respecting the distribution of powers. It is not disputed that the bank is liable to be assessed for its specie, but the contention is that it is not liable for assessment on, and the Province can confer no power upon the Municipality to levy an assessment upon notes of the Dominion of Canada held by the bank as a portion of its cash reserve as provided by the act. The Province has the power, exclusively, to make laws in relation to municipal institutions in the Province, and I suppose it cannot be disputed that this confers general power to impose taxation upon the property and persons within the municipal district for municipal purposes, except in cases of exemption under the B. N. A. Act. By section 125 no lands or property belonging to Canada, or any Province,

shall be liable to taxation. It cannot be said that these notes in question are the property of Canada, and, therefore, no exemption can be claimed under that clause. It is argued, however, inasmuch as "banking," "incorporation of banks," and the "issue of paper money," form a class of subjects to all matters coming within which the exclusive legislative authority of the Dominion extends, that the power of the Province to authorise taxation for Municipal purposes is limited by this language and the assessment cannot be held to be operative against the notes in question. This mode of reasoning would preclude the plaintiff from levying taxes upon the real estate or any other property of the bank. The same reasoning might be held to exclude other property under the classes of subjects, "Navigation and Shipping," "Currency and Coinage," "Bills of Exchange and Promissory Notes," and perhaps the "Regulation of Trade and Commerce." "Exclusive" power in the Dominion to regulate banking by legislation does not seem to me to exclude the power of the Province to authorise assessment. The same may be held of incorporation of banks, because, if not, the property of all corporations created under Dominion legislation would be exempt from all control of the Province. The issue of paper money comes nearer the line. Does the exclusive power in the Dominion to legislate on all matters within this subject, "the issue of paper money," limit the taxing power of the Province so as to exempt this paper money in the hands of a holder from the operation of a general assessment law? In the first place, can the Dominion legislate to exempt the paper money issued by it from taxation. Although the word "exclusive" might seem, in such case, out of place and inconsistent with the intention also to give "exclusive" power to the Province to impose taxation in cases where no legislation to exempt has been passed by the Dominion, still there may be room for discussion on the point. As it is not by reason of right to legislate respecting banking, that it could be said Parliament derives power to exempt paper money from taxation, such paper would be free from taxation, not in the bank alone, but in the hands of everyone; moreover, the right to exempt all money, ships, bills of exchange, and, I suppose, all articles of trade and commerce, would exist

by the same general language in the one case as in the other. I think, therefore, that it was not the intention, in framing section 92, which gives exclusive power to the Province to tax and to make laws relating to Municipal institutions, to limit that power by the language of section 91, in the manner here contended for. I do not wish to be understood as offering an opinion as to whether there may not be power in the Dominion, by legislation, in issuing paper money, to give that money a character by which it may, perhaps, by being property of the Dominion, be exempt from taxation. It was said at the argument that section 125, B. N. A. Act, exempting lands and property of the Dominion and the Provinces from taxation, manifested a design that no other property should be exempt from assessment; but I think it does not follow that because, in the act, there were words selected to afford mutual exemption for the Dominion and the Provinces, that other words might not consistently be introduced to give power to either of the legislative bodies to exempt in certain cases. It is true enough that though the right of exclusively making laws in relation to provincial municipalities is given to the Province, words might be found to modify and subject that right to the Dominion powers, but the conclusion can hardly be drawn from the words of these two sections, distributing the powers of legislation, that it was the intention to prevent the Province from subjecting the "property in the Province" of every inhabitant to the burdens necessary for sustaining municipal institutions. The construction contended for would, it appears to me, lead to endless confusion. All that I think necessary in this case to hold is that all property, except that of the Dominion or the Province, may be made equally liable to assessment for municipal purposes by Provincial legislation. This does not seem to me to be a question relative to banks or banking.

By the act in question the bank is required to hold the portion of the notes sought to be relieved from the assessment in lieu of that amount of its reserved capital. I do not understand that any force is to be derived from that act to assist defendant's contention. If the notes are to be exempt, they are exempt, because, being paper issued by the Dominion, the Parliament has exclusive power to legislate. So far, I have dealt

only with the construction of the words. The difficult point, it was suggested, was to determine whether there are not implied powers in the Dominion Parliament limiting the right of the Provincial Legislature. Our attention was directed, therefore, to another argument. The issue of these notes, we were told, is a part of the machinery for carrying on the Government of the Dominion, and the local power cannot interfere with it. This argument is adopted from the United States of America, where it has been held that "the State Governments have no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers, nor to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the powers vested in the National Government." *1 Kent's Com.*, 425.

This doctrine was established by Chief Justice MARSHALL in the great case of *McCulloch* v. *Maryland*, and avowedly on the principle of self-preservation, because the power to tax would involve the power to destroy, and the power to destroy might defeat and render useless the power to create. The clause in the constitution declaring that the laws made in pursuance thereof should be the supreme law of the land was relied on in pronouncing judgment restricting the taxing power of the State by a superior unapplied power in the general Government. Considering the discussion already had in Ontario and New Brunswick, our task might be a more difficult one were we called on to say whether this reasoning,—the argument drawn from the peril of the supreme national government, if sound, applies to our condition and existence under an Imperial Act which may be amended or modified by the Imperial power. I think this case, even assuming the soundness of the doctrine referred to, and that it may be applied where like cases occur, does not come within the principle contended for. This is not the case of a national bank, and it is not, it seems to me, a case where a question of the right under Provincial legislation to control the measures of the Dominion Government arises. By section 14 of cap. 5, 34 Vic., the bank shall always hold, as nearly as may be practicable, one half of its *cash* reserves in Dominion notes, and the proportion of such reserves held in Dominion notes shall never

be less than one-third thereof. It is, as has been already said, admitted that the specie is taxable, but not the notes substituted under the act. These notes are not the property of the Dominion Government, but the property of the bank, a corporation with no more legal rights to exemption than any individual tax payer. Upon this ground, and without offering an opinion upon the power of the Dominion to restrict the right of the Province to authorise a general assessment, I think the judgment should be for the plaintiff. The defendant must pay the costs.

McDONALD, J., concurred.

SMITH, J.—I am of opinion that the bank is liable to be assessed on Dominion notes as well as other paper, or specie, they being the property of the bank, and not of the Dominion Government; and their liability to assessment cannot in any way affect the banking or other interests of that Government.

McDONALD *v.* ROYAL INSURANCE COMPANY.

Before SMITH, JAMES and WEATHERBE, JJ.

(Decided December 18th, 1882.)

Agency.—Power of Attorney to Insurance Agent.—Company was liable for transactions outside their ordinary business.

THE defendants, an insurance company, gave a power of attorney to their agent, whereby they constituted him their true and lawful attorney, to act as the Agent and Receiver of said company, and for that purpose to effect insurances on behalf of the company, and the power of attorney conferred other powers necessary to the ordinary working of such a company. The defendant deposited with the plaintiff, a banker and broker, and bought exchange, &c., the account being kept in the name of the company, and, in the course of the transaction, he became indebted to the plaintiff in the sum of $314.18, for which action was brought.

Held, That defendants were not liable, the transactions being outside of their ordinary business.

This was an action by plaintiff, who carried on business as a banker and broker, to recover from the defendant company a balance due on an account with James William Hutt, defendant's agent. Plaintiff's cause of action was set out in the last count of his declaration, as follows:

And the plaintiff also says that the said defendant company, by an instrument in writing, under the common seal of their company, appointed, on or about the 30th day of December, A. D. 1875, one James William Hutt to be the agent of the said defendant company at Halifax, and to be the true and lawful attorney of the said defendant company, and promised and guaranteed among other things to ratify and confirm all and whatever their said agent and attorney should lawfully do or cause to be done about the premises, and the plaintiff says that the said James William Hutt, under his authority as the agent and attorney of the said defendant company at Halifax, opened an account as such agent with the plaintiff's banking house at Halifax, and the plaintiff recognising the said James William Hutt as the agent of the said defendant company, honored his cheques and advanced and paid money to and for him as such agent, as aforesaid, at his request as such agent, and sold him bills of exchange for the defendant company, at his request as such agent, whereby the sum of $314.18 became due from the said defendant company to the said plaintiff, and all things happened, and all times elapsed, and all conditions were fulfilled necessary to entitle the plaintiff to the recovery of said balance and sum of money; yet the said James William Hutt has not, nor has the said defendant company, paid the plaintiff the said $314.18, and the same remains due and unpaid.

To this defendant pleaded:

And for a second plea, as to the last count of plaintiff's declaration, the defendant company says that the said James William Hutt had no authority from the defendant company to open an account with, draw cheques on, or borrow money or purchase exchange from the plaintiff, as alleged, and he, the said James William Hutt, never was the agent of the defendant company for such purposes or for any of them.

And for a third plea, as to the said last count, the defendant company says that the said James William Hutt did not under the authority and as the agent of the defendant company open an account with the plaintiff, or borrow money or purchase exchange from him, as alleged, nor did the plaintiff ever honor the cheques of the said James William Hutt, or advance and pay money to or for him as such agent, as alleged.

The power of attorney under which Hutt acted for the company was as follows:

KNOW ALL MEN BY THESE PRESENTS, That the Royal Insurance Company, (registered and incorporated in pursuance of the statute made and passed in the seventh and eighth years of the reign of her present Majesty Queen Victoria, intitled an Act for the registration, incorporation and regulation of Joint Stock Companies, and by that name empowered to sue and be sued,) Have, for divers good causes and considerations thereunto moving, made, ordained, constituted and appointed, and by these Presents do make, ordain, delegate, constitute and appoint James William Hutt, of Halifax, in the Province of Nova Scotia, British America, the true and lawful attorney of the said Royal Insurance Company, to act as the Agent and Receiver of the said Royal Insurance Company, for Halifax, aforesaid, and parts adjacent thereto; and for that purpose, and the more fully enabling the said attorney to conduct, manage and carry on the duties connected with such office or employment of Foreign Agent and Receiver, to effect insurances on behalf and in the name of the said Royal Insurance Company against loss or damage by fire upon all descriptions of buildings, warehouses, goods and merchandize in Halifax aforesaid and parts adjacent thereto; also to receive proposals for assurance on lives or survivorships on the joint continuance of two or more lives or the duration of one or more life or lives for any term of years, absolutely or contingently, determinable on a life or lives, and all such other assurances, whether connected with life or not, as may be effected according to law, including endowments for widows, children, and other persons in Halifax aforesaid, and parts adjacent thereto; and to issue policies for the same on receiving the special authority of the Director, Manager, or other officer of said Company in each case to that effect: Subject, nevertheless, entirely and under all circumstances to the instructions which shall from time to time be given by the manager or other officer of the said Royal Insurance Company to the said Attorney, and for effectuating any of the purposes aforesaid, the said Royal Insurance Company do hereby authorise and empower the said Attorney to sign the names of any two of the directors for the time being

of the said Company opposite to or against the common seal of the said Company to any policy or policies of insurance to be granted or effected for the before-mentioned purposes upon such printed forms only as shall be supplied to him from time to time by the said Company, and in such manner as he shall be directed by letters of instruction from the said manager or other officer of the said Company; and also, for and on behalf of the said Royal Insurance Company, to collect and get in, ask, demand and receive all and every the premiums and other charges, sum and sums of money whatsoever, which shall become due and owing to the said Company from any person or persons whomsoever, in or about the effecting or granting of any such insurances as aforesaid, or on any other account whatsoever relating thereto or otherwise howsoever; and also, in the name and on behalf of the said Royal Insurance Company, to adjust and settle all or any accounts with all and every or any persons or person with whom the said James William Hutt shall or may have, as such Agent or Receiver, as aforesaid, or for or on the Company's behalf, any dealing or transactions whatsoever as aforesaid; and, also, subject to any instructions as aforesaid, to compromise, agree and determine, or refer to arbitration, all disputes or differences that may arise between such person or persons and the said Royal Insurance Company, or the said James William Hutt as Agent and Receiver as aforesaid; and, also, whenever occasion shall arise, in the name of the said Royal Insurance Company or otherwise, but on its behalf, to commence and institute any actions, suits, or other legal proceedings for the recovery of any debts, claims, damages or demands which the said Royal Insurance Company shall have against any person or persons whomsoever; and upon receipt of all or any of the sum or sums of money, premiums, claims and demands, as aforesaid, for the said Royal Insurance Company, and in its name, and on its behalf, to give good and sufficient receipts, acquittances and discharges for the same to any person or persons whomsoever: And, also, subject to such instructions as aforesaid, by and out of all the moneys which shall come to the hands of the said Attorney, by virtue of these presents, or otherwise, to pay, satisfy and discharge all or any sum or sums of money which may hereafter become

due, owing or payable by the said Royal Insurance Company to any person or persons whomsoever for or in respect of any policies of insurance to be granted or effected by the said Attorney for or on behalf of the said Royal Insurance Company to any person or persons whomsoever; and, also, subject to like instructions, to adjust, arrange, liquidate, settle, allow and determine all and every or any accounts or account, reckonings, disputes or differences which may hereafter depend or remain unsettled between the said Royal Insurance Company or its said Agent and Receiver by and on the said Royal Insurance Company's behalf, and any other person or persons touching, arising, or happening out of any insurance transaction or business whatsoever, and, generally, to do and execute all other such matters and things for the said Royal Insurance Company, or on its behalf, in and about the effecting and granting of such insurances as aforesaid, and of all other matters and things touching, relating to, concerning, or otherwise connected with the duties or business of Foreign Agent and Receiver of the said Royal Insurance Company which the said Attorney shall or may deem requisite or essential in and about the premises, the Royal Insurance Company hereby agreeing to ratify and confirm, and do hereby ratify and confirm, all and whatsoever their said Attorney shall lawfully do or cause to be done in the premises, subject, nevertheless, to such special or other instructions as shall, from time to time, be given by the Manager or other officer of the Company.

The cause was tried at Halifax before Mr. Justice JAMES, in May, 1881. Plaintiff's evidence was as follows:—

I do business in Halifax as banker and broker under firm J. S. Macdonald & Co. Have been seven years in the business, —a general banking business. Receive money on deposit, and buy and sell exchange. Knew James W. Hutt, agent for defendant company. He had been doing business as agent for defendant company. Hutt opened an account with me in 1877. He said he wished to open an account and deposit and draw in the usual way for the defendant company, and he would, likely, at certain times in the months, have to overdraw his account. It was in

August, 1877. 4th August. Account opened in name of Royal Insurance Company, and he would draw cheques in name of Royal Insurance Company, per J. W. Hutt, agent. He deposited moneys or cheques and drew cheques almost daily. The moneys he deposited were placed to that account, and he signed as above. He drew a large number of cheques. I knew he was representing himself and acting for them. I effected personally both life and fire insurance through him with that company some years previous to that time. Had several transactions in exchange while account was running. It was sterling exchange. When he had losses to pay he would give me exchange on the company, which I would place to his credit at current rate of exchange. Sometimes I did not want the exchange, and then he would sell the bills to other banks and deposit the money with me. The exchange would be signed same as the cheques, Royal Insurance Company, per J. W. Hutt, agent. The exchange would be sent to England, to my agent, or sold by me to other banks, and it was always paid. Hutt ceased to do business for defendant company about 7th April, 1880. At that time the account was overdrawn $314.18, which sum is still due to me on that account. While the account was opened he deposited with me in all $69,000 and had drawn that amount and $314.18 more.

Cross-examined.—I have a license for City of Halifax. I have none under the Dominion Government. It has never been exacted. I pay interest on deposits. I paid him 5 per cent. interest when balance in his favor, and charged 7 per cent. when balance against him. I made no returns to Finance Minister. The balance was due a few days before he left. The account was simply opened with the Royal Insurance Company. None of the cheques had bill stamps on. Interest was deposited or credited each month. If I had not honored the cheques the balance would have been the other way.

Andrew Grant sworn.—Know Mr. Hutt. Was in his employ when he was doing business for defendant company. Transacted business for him with them. Deposited moneys and drew cheques while he was doing business for defendant company. There was an inspection of his affairs by Digby, Sub-manager of the company; he came from head office,

Liverpool. He went through all the books, and examined them, and inspected the risks. He came in 1878 and made that inspection. Mr. Hutt showed him his accounts and papers. The company's books which he examined would shew the state of the account with plaintiff. They would shew that the account was sometimes overdrawn. Mr. Johnson was the same person that removed Mr. Hutt in 1880. He left the Province shortly. He carried on the business after Hutt left, until the present agent was appointed, and during that time he effected insurances.

Cross-examined.—I went to Hutt about April, 1877. He was removed in April, 1880. I was present when Johnson examined the company's cash book. I saw him sign policies. I saw letters signed by him from England. I saw letters in '78 from head manager that he would be here. I don't know what authority was given him by those letters.

A nonsuit was moved for and refused. No evidence was given on the part of the company. The jury found a verdict for plaintiff for the amount of his claim, and the cause now came up on a rule to set the verdict aside, and for a new trial.

The rule was argued April 19th, 1882, *Ritchie, Q. C.*, in support of rule, *Attorney-General*, contra.

SMITH, J., now, (December 18th, 1882,) delivered judgment as follows :—

This action was brought to recover the sum of $314.18, alleged to be a cash balance, (per book,) with interest, due from defendants on an account kept with one James W. Hutt, as their agent. It appears that the said Hutt opened an account with the plaintiff in the name of the defendant company in 1877, which continued up to April, 1880, during which period he deposited moneys or cheques in the name of the company and drew largely against such deposits. In April, 1880, when Hutt ceased to do business for the company, the account was overdrawn by him to the extent of the amount claimed. There is no dispute as to the fact of the said Hutt being the agent of the defendants, doing business in this Province as an insurance company, under a power of attorney put in evidence ; but, the question arises how far, under this instrument, Hutt had authority to deal with the plaintiff in

the manner he did, by drawing cheques, &c., to render the defendants liable in this action. I have carefully perused the said power of attorney, and I cannot find that it conveys any such authority. It states that "they constitute and appoint James William Hutt, the true and lawful attorney of the said company, to act as the *Agent* and *Receiver* of the said company, and, for that purpose, to effect insurances on behalf of said company," and gives him certain other necessary powers to enable him to conduct the ordinary business of a life and fire insurance company. But to open an account with a banker and deposit the moneys of the company, and deal in exchange and draw cheques, and overdraw his account, is a very different thing for which I can perceive no authority whatever, either from the oral evidence, or from the power under which he was acting. In this view of the case it will be unnecessary to deal with the several legal points raised at the argument. I think the rule *nisi* to set aside the verdict must be made absolute, with costs.

WEATHERBE, J.—In this case no claim was established against the defendants, no authority having been shown in Hutt by which he could bind them in the manner contended for by the plaintiff. On this ground I concur in the decision just read.

JAMES, J.—I concur in the decision.

McCULLY *v.* BLAIR.

(Before McDONALD, SMITH, JAMES, and WEATHERBE, JJ.

(Decided December 18th, 1882.)

Title by possession.

In an action of trespass plaintiff, apart from his evidence of title, relied on possession for a long period of years, the acts of possession consisting of the construction of a system of canals, (several of them inside of the line claimed by defendant) connected on the one side with lakes, and on the other with a Bay of Fundy River, by which the lands in controversy were flooded twice a day, and the surface of the land eventually raised, thus converting the land from a "useless swamp, which could only be crossed by a team when frozen, to firm productive and valuable land."

Held, That plaintiff was entitled to recover under this evidence.*

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* The elaborate opinion of JAMES, J. touched a number of points as to the title to the land in controversy, the effect of certain classes of evidence, &c., but the judgment of the Court proceeded solely on the question as to possession.

This cause was originally argued March 18th, 1881, before a Court composed of DESBARRES, SMITH, JAMES and WEATHERBE, J J., on the following rule :—

The evidence in this cause having been taken at Amherst by Mr. Justice McDONALD,—It is ordered by the Court, by and with the consent of the parties hereto, their attorneys and counsel, that the evidence so taken be a case between the parties for the opinion of the Supreme Court, and that the said Court shall have power to draw the inferences in the same way that a jury could do from the said evidence, and have power to order a new trial, or that judgment be entered for the plaintiffs or defendant, as to the said Court may seem right on the whole case, with costs of the trial, and of any argument that may take place herein, in the discretion of the said Court. And it is further ordered that either of the parties shall have the right to avail themselves of the objections and points raised at the trial, and if the Court shall think that evidence was improperly rejected, it shall have power either to order a new trial, as above provided for, or to order that such evidence be taken before a judge or commissioner, and added to the case, as the said Court may think best.

Dated June 29th, A. D. 1880.

By the Court,

(Sgd.) E. B. BLENKHORN,
Prothy.

The Court felt some doubt as to their jurisdiction to hear or determine the case on this rule, and in order to enable a decision to be given, a second rule was passed, by consent, in the following form :—

It is ordered by the Court, by and with the consent of the counsel for the plaintiff and defendant, (in order to remove any question as to the jurisdiction of the Supreme Court to hear and decide upon the argument on the rule made herein on the 29th day of June, 1880,) that the said rule dated the 29th day of June, 1880, be amended, by inserting therein, after the words " attorneys and counsel," the words following, that is to say " that a nonsuit be entered in this cause, subject to the opinion of the Supreme Court *in banco;*" and it is further ordered by the like consent, that the said Supreme

Court, under the said rule, shall have power to order the said nonsuit to stand, if it should think fit so to do; also, that the amendments herein ordered shall be taken and considered to have been made in the said rule on the day on which the said rule bears date.

Halifax, 5th October, A. D. 1881.

By the Court,

(Sgd.) J. PARSONS,
Prothy.

In consequence of the retirement of Mr. Justice DESBARRES, from the Bench, it was agreed that the cause should be decided without further argument by the remaining Judges, with the addition of Mr. Justice MCDONALD. The following is the argument before the Bench, as originally constituted:—

Attorney-General, with whom was *C. J Townshend*, for plaintiff.—We claim a documentary title and title by possession as well. The documentary title is from the Crown by grant dated 1831, and we claim adverse possession against defendants, which would prevent them from acquiring title and also estoppel, having entered upon and improved the land with the knowledge of defendants. There was no attempt to grant the township of Amherst, but only a certain quantity of land in the township. The township contains 80,000 acres; the quantity granted was 26,750 acres. There was no intention that anything should vest in the grantees until after partition.

C. J. Townshend.—The grant from the Crown is dated April 13th, 1830, to Cyrus and William McCully, and the title of Cyrus and of the heirs of William is conveyed to Jonathan McCully by deed dated July 10th, 1868; Jonathan McCully conveyed his title to Robert McCully by deed dated Augut 4th, 1871. Robert McCully devised to the present plaintiffs and Harry D. McCully by will dated April 15th, 1878, proved May 22nd, 1878. Harry D. McCully devised his interest to the present plaintiffs by will dated September 20th, 1879, proved October 2nd, 1879. We have proved that the land in dispute is a portion of the original grant; we have also proved continuous possession since 1820; the drawing off the water from the lake and the digging of the canals are

clear and notorious acts of possession. We had the only possession of which the land was capable. The canals had to be kept open so that the clear water could get out and the muddy water could get in. The mud was deposited and drove the waters of the lake back every year. Not one of the parties under whom the defendant claims was assessed for the construction of the canal; the canal was for the benefit of the owners of the marsh, and if any of the parties under whom defendant claims were owners of the marsh, or were benefitted, they would have been assessed by the Commissioners. The Commissioners constitute a court. The defendant has shown no title, by documents or possession, to the land in dispute, or any part. (WEATHERBE, J.—The other side must show what title they rely on.)

Rigby, Q. C., contra.—To recover in their action, plaintiffs must prove either actual possession of the locus or constructive possession by virtue of the grant. Cutting a canal by which land is gradually deposited is not such a possession as to give title. The grant includes 350 acres. The land in dispute is only 3 or 4 acres. The object of the acts of possession was not to drain the big lake, but to use the water to keep the canal open, so that when the tide rose it would flow in over the marsh and deposit mud, thus reclaiming the marsh. If they have a good grant that they have entered under and have possession of a part, we admit that that will give possession of the whole under our decisions. The McCully grant of 1730 has not been localized by any evidence; the description shews that it is in the township of Amherst, no natural boundaries are mentioned, there is nothing to show that what Neil surveyed was within the grant. The plaintiff's deeds, put in evidence, are not shown to convey the same land described in the grant, the descriptions are entirely different, they should have shown that they are the same. The crown could not grant this land which I referred to as being in *the* township township of Amherst, because there was a previous grant outstanding. Exhibit A. is the grant of the township of Amherst. The Attorney-General says it only conveys a third of the land in the township; the land in both grants is said to be in the township. If the Crown granted a certain portion of the township of Amherst to private individuals and

there was no partition, the latter would become tenants in common with the Crown of the whole township. No partition has been proved. We tried to prove it and to shew that a portion of the land claimed by plaintiffs was included, but the evidence was excluded. After the first grant, before partition, it was not competent for the Crown to make a specific grant. The grant gives 26,750 acres out of the township, which includes altogether 80,000 acres. The Crown could not grant the lake even if not granted before, *L. R.*, 3 Appeal Cases, 641. There is evidence that we were in possession of the land adjoining this land. We show a possession of certain lots under the grant of the township of Amherst. Dickie, who sold to Blair, traced his title to Robert McGowan, one of the grantees. Forrest, Stewart and Sharp were also grantees. (*Attorney-General.*—The deeds are bounded by the lake.) If you are bounded by a river, you take to the centre. (WEATHERBE, J.—Not if the words are "to the edge of the river.") If I get a piece of land in the township I become a tenant in common. Cites *Davis* v. *Lewis*, 2 Chitty, 535. As to admissibility of evidence of reputation, when a deed is referred to as lot 30 you can give evidence to show that it has always been so known, and to show what is included. We have title to the upland and marsh, either through the Amherst grant or by possession ; we ran lines across the lake. As to possession cites *Cunard* v. *Irving*, James' Reports, 31. Only one witness proves the cutting of hay on the Dixon lot, more than 20 years ago. He said he did not cut far on it; but the possession was interrupted 17 years ago. The ditch was made by the Commissioner of Sewers, and therefore could give no title to the plaintiff; it was done by force of the statute and for the benefit of all parties interested. If we were tenants in common with the Crown of all the ungranted portion of Amherst township, we are tenants in common with the plaintiffs, and one tenant in common cannot eject another. We contend, also, that there is evidence of a partition. Testimony was rejected on this point, but there is sufficient to justify the taking of further evidence. As to the question of forfeiture in consequence of want of partition, cites *Wheelock* v. *McKeown*, Thomson's Compilation, 15. The presumption is that every-

thing was rightly done, and for this reason evidence of a plan and partition should have been received.

Attorney-General, in reply.—The grant of the Amherst township in the evidence of survey and partition, passed no title to any one; *Costin* v. *Chapell*, 1 R. & C., 40. The grant is a grant of land already partitioned, and a subsequent partion would be of no avail. The Crown cannot be a tenant in common by operation of law, but has the allodium. The grantees of the Crown may be tenants in common with each other, but not with the Crown, *Blackstone*, vol. 2, 105. The grant is not of undivided, but of specific shares, "according to the plan and present division." None of the parties under whom defendant claims trace their title to the grant. Every one of the acts in interruption of our possession strengthened it. McCully forbade Dixon to take the grass, but he went on and took it in spite of opposition; the mere assertion of right by Dixon gave him nothing; he claimed no particular part of the marsh. None of the defendant's deeds touch an inch of the plaintiff's land; no bog or lake is mentioned or bounds given. The deeds under which defendant claims convey no part of the locus, (see the several descriptions in them,) and therefore *Cunard* v. *Irving* would not apply, even if he had possession. Matthew Logan was the only person who conveyed any part of the lake, and he only did it in 1876. In regard to the lake, the rights of the Crown to title in the land in the colonies is presumed to extend to all land which is ungranted; *Cruies' Dig.*, vol. 3, p. 36. All the lands in this country were added to the Crown by treaty. The question in the case cited was not whether the Crown had the right to grant, but whether it owned the land. The evidence of Hill localizes the grant sufficiently; he fixes the position of several well-defined and undisputed boundaries, says these and all the other lines are correctly delineated on his plan. The boundaries which he gives being ascertained, the others can be astertained by mathematical deduction.

JAMES, J., now, (December 18th, 1882,) delivered the judgment of the Court:—

The property claimed is described in the writ as situate "in Amherst township, on the Commons, so called," and

designated by metes and bounds so as to include the eastern part of the McCully grant hereinafter mentioned, including the Big or Nappan Lake, and an area of land at the western end of the lake. The defendant, in pleading, restricted his defence to a part of the land claimed, including the lake, and a part of the area lying to the westward of it. The plaintiffs claim by grant and possession, the grant from the Crown to Cyrus McCully and others, dated 15th April, 1830, describes the land as "being contained in the tract marked A. on the the amended plan abutted and bounded as follows, that is to say: beginning on Denson's Line, at the distance of ten chains, on a course east from Sunken Creek, in the township of Amherst," and goes on to designate by courses and distances an area of extremely irregular shape, contained in the plan, with no less than twenty-seven lines and as many angles; but, as the description reads in the grant, without any natural or artificial monuments or boundaries by which it might be identified on the ground, except "Denson's Line," and the "Sunken Creek." The whole area, including land covered with water, includes 360 acres, the whole of which is either marsh, bog, or land covered with water. The first question that arises here is, has the plaintiff's evidence identified the lot claimed, as a part of the area conveyed by this grant? We have no evidence whatever of the original survey upon which the grant was passed, nor any other survey on the part of the plaintiffs of the land contained in their grant, until that of Mr. Albert J. Hill, in 1878, and his evidence and the plan he prepared on that occasion are before us; nor have we evidence of the original or any other survey of the Denson line. I shall have occasion, hereafter, to enquire whether, in making his survey, he took the right starting point, but if he did, it appears evident from an inspection of the plan, (lines 827 to 830), and his express testimony, that the land claimed in the writ is within the boundaries of the grant, and that the land claimed in the defendant's plea is part of the land claimed by plaintiff in the writ. No dispute can, I think, be maintained on this point. The main question, and it is one of considerable difficulty, is as to whether Mr. Hill, in making his survey, started at the right point—which was fixed by the grant as on "Denson's line," and at 10 chains east of "Sunken creek,"

It was contended at the trial and argument that there is no evidence to identify the line and starting point adopted by Hill, with those in the grant. Mr. Hill says, (line 775), * * "I went first to the house of Mr. John Smith, who lives on the adjoining lot; he went with us to point out the Denson line and Sunken creek. He showed us Denson line, which appeared to be well marked, but the Sunken creek was indefinite. Mr. Smith was uncertain where Sunken Creek was within small limits. I set the compass on the Denson line and found the variation to be about six degrees, which corresponded with the date of the grant; we then chained from a point 10 chains from what was pointed out as Sunken Creek, forty-seven chains. At the distance of 47 chains I set up a stake as a temporary mark; we then ran according to the description of the grant, a course until it ran us into the lake. As we came to the lake we were forbidden to go any further by James Noilles, an adjoining proprietor."

The first question for us here is to decide whether the surveyor was right in adopting the first line he ran as the Denson line. We have no evidence when or by whom this line was first surveyed, but we have evidence that there was such a line known and recognized in 1830 in the grant itself, which gives the starting point as "beginning on Denson's line," and, by referring to the plan annexed to the grant and referred to in the description, we find Denson's line laid down as the southern boundary of the land, and on that side which is nearest to the Nappan River, distant about 60 chains, and running as Mr. Hill's line ran, and as defendant himself indicates the line, which he recognized as the Denson line to run, in an easterly and westerly direction. The grant says "running *east*. Mr. Hill goes to the locality and finds—no matter on what information—a line which "appeared to be well marked," running in the same direction, allowing for variation of the compass, as the line mentioned in the grant and depicted on the plan. This evidence, although indicating a very great probability that Hill had found the line, is not alone sufficient. Let us see what the defendant's witnesses say about the Denson line, and let us remember that they and the defendants counsel had, when they gave their evidedce, Hill's testimony before them. The defendant says that he himself

claims to the Denson line, that he had been on it with his surveyor, Mr. Donkin, three years before, and had run a line up to it and placed a stake upon it. That stake, from the defendant's own evidence, must have been in, or nearly in a continuation of Hill's line, but further east than he ran. I infer from his evidence that the Denson line was a well-known line and that it was at or about the place where Hill found it. Hon. R. B. Dickie refers to it repeatedly. He says in one place, referring to the defendant's lots, "they are all bounded by the two end lots Denson's line and 45 acre lots." Again, speaking of the same locality, "We went across the lake back again and found the line continued to the Denson line, they were old blazed lines, well defined and easily traced;" and again, in cross-examination, "The Denson line is a well defined line; I paid particular attention to the Denson line as I was agent for lands south of it." Nelson Forrest, who had owned and sold lands upon the Denson line says, "It ran up to the Denson line," again, "his lot ran southerly to the Denson line" and again, "we ran the Denson line to Noilles' place." Mr. Charles Donkin, who had been a land surveyor in the County over 30 years says, "I am familiar with the Denson line. * * * From the Denson line I found a line running towards the lake northwardly." John Smith, who was with Hill in his survey, more than once in his evidence refers to the Denson line as familiar to him, and James K. Noilles who holds the land bounded on the west by plaintiff's claim under the grant, and on the south by the Denson line, speaks of it repeatedly and says in his direct examination, "I never was present at any chaining or survey of the McCully grant, except on the Denson line, and the western side line of the McCully grant; the Denson is the southern line of the McCully grant, up to my land. It runs northwestwardly along what I claim as my land, it then runs in a northeasterly direction, skirting what I claim as my land." My object in introducing these extracts is not solely to show that as all these witnesses were examined after Hill's evidence was before the Court, the correctness of Hill's selection of the Denson line derives strong confirmation from the fact that not one of them ventures to impugn its accuracy, though that circumstance is not without weight, and would

naturally and properly influence a jury. My principal object is to observe that this old and well-established line, known and recognized by the Crown fifty-two years ago, most probably run and established at the original survey of the township, and known as an actual and visible object at the time of this trial, supplies in itself, as I conceive, that which is a desideratum in this case. It is mentioned in the grant, not as a line to be found by reference to some natural or artificial monument, but as in itself a thing established, a thing to be seen and found as though it were a house, a church, or a bridge. That it is as well known and recognized as if it were a building or the boundary line of any hamlet, a village, or manor, is evident from the defendant's evidence. The fact that none of his witnesses have ventured to impugn the accuracy of his survey will have increased significance when we consider another branch of the case. It was urged at the argument by the Attorney-General that evidence of reputation is applicable to such a line as this. Why is such evidence admitted in case of "the limits of a town, the extent of a parish, the boundaries between parishes, hamlets, or manors, or even a reputed manor and the freehold of a private individual, or between old and new land in a manor," and all the other cases summarised in *Taylor on Evidence*, p. 522, section 614? It is because there is something of a public nature in their character which raises a presumption that many persons—the public generally—knew the facts relating to them so generally that they were treated as indisputable facts, facts so well established and so publicly known that the public reputation of them constitutes evidence on which a Court of Justice will act. The necessity for receiving this class of evidence is the more imperative, because, in most of such cases, the evidence of the inception of such things to be proved has been lost by the lapse of time. Does not this line possess all these requisites? First, it is a very ancient line Secondly, the evidence of its inception has been lost. Thirdly, there are, in fact, many persons—and the inhabitants, probably, of a large section of country—all of whose lines have to be proved by some relation to this one. Fourthly, it is known, and well known, to all the witnesses who were asked about it. Fifthly, it is well defined; not a shadow of

doubt has been thrown on its locality. Sixthly, it is treated in the grant as an established line, as being in itself not a thing to be described, but only named, as a thing needing from its public character, no description, as being in itself a boundary monument, and therefore not needing to be identified by any other monument, natural or artificial. To this last circumstance I attach especial significance, as showing that it was then recognized by the Crown as a line of so public a character that they granted by it by name, without any indication where it was to be found. I think this is a proper case for calling in aid evidence of reputation, a much stronger case than many to be found in the books, and if it be, the evidence in this case is overwhelming as to the locality of this line, and is applicable although the particular contest is between private parties. *Fisher*, sec. 15, citing COLERIDGE, J., in *6 A. & E.*, 525, 529. The direct evidence of the other monument, "Sunken Creek," is not very satisfactory at first sight. J. K. Noilles, a witness for the defendant, who knows the locality says, "The surveyors never could agree whether to start from the edge or centre of the creek; it is a wide creek." And John Smith, who was present with Hill, (although he denies having pointed out the creek to him), says, "There are two creeks on the Denson line 4 or 5 chains apart, one is large, 20 or 25 feet wide, the other 14 or 15 feet wide. * * I know no other creek on the Denson line." Hill, whose evidence on this point I have already extracted, speaks of only one creek, therein agreeing with Noilles, though they all three admit of some uncertainty, according to Smith, an uncertainty extending so far as 4 or 5 chains. The only material discrepancy in the evidence is on this point. But is there anything also in the evidence which will indicate, with reasonable certainty, that Hill, however he came by it, did in fact select the right starting point? The plan annexed to the grant, a copy of which is appended hereto, shows a large projection on the eastern side of the area, being a very irregular shape. The other parts of the area are on this plan defined by straight, red lines and angles, and in the grant the whole area, is described by straight lines and angles, some twenty-seven lines and as many angles in all. But this projection is not so delineated on this plan, but by a crooked red line forming an

irregular oval, the two ends of which red lines, where the eastern extension joins the rest of the area, are connected by a crooked black line completing the irregular oval, so as to indicate that this extended area has a different character from the rest of the grant. Indeed it is impossible to look at the plan without forming the impression that this irregular projection was intended to represent a body of water, although it is not so stated on the plan; if it were we should have very little difficulty with the case, because we should then have had a natural boundary sufficient to give us all the other outlines of the grant. In order to ascertain if there is such evidence in the case as to satisfy us that this projection was in fact like, and ought to be considered as a natural monument to guide us to a conclusion, let us assume that Hill did in fact select the true starting point of the survey. We find that he measured from his starting point in strict accordance with the description in the grant on the Denson line, 10 chains east, then 47 chains, thence north 39 west 18 chains, which carried him into a cove or a lake corresponding in position with the part of the area which I have described, and at the points where the black line connects the ends of the irregular red line. This line carried him just far enough into the cove to permit the succeeding line mentioned in the grant to follow on the course given in the grant, a nearly straight shore, 25 chains, 75 links, into another cove, thence still following the courses and distances given in the grant from cove to cove and from headland to headland, comprising 13 lines and as many angles, until it comes to the point where the eastern end of the black line joins the red line on the plan. It cannot, of course, be said that the lines of the grant which have been projected by Mr. Hill on his plan, now before us, fit the area of the lake with absolute precision, but they do so to such an extent as to carry an absolute conviction to my mind that the eastern area on the plan annexed to the grant was a lake. If this were so, then Mr. Hill must have started from the correct starting point, as stated in the grant, otherwise his survey would have either avoided the lake altogether or would have been affected by it in some other way than to show that a survey of the grant from Hill's starting point includes an accurate survey of this very

irregular area. The force of this evidence is heightened so as to amount to absolute mathematical demonstration, when we discover from Hill's evidence that he returned to the starting point, and, measuring by the lines of grant northerly and easterly—at the end of thirteen lines and as many different courses—he arrived at the point of the same lake directly opposite to the point at which he had struck the lake when surveying in the opposite direction, and at the very point where the northern end of the black curved line on the grant plan touches the northern shore of the lake. It is needless to say that this is an additional and independent verification of the original starting point, which is thus established to have been correct, at least within a very few rods, and which may, perhaps, be still more accurately ascertained in a new survey, by surveying the lake first and by surveying from it, finding the precise position of the starting point. My own opinion is that Hill's starting point was perfectly correct. The full force of this argument can only be fully appreciated by a comparative examination of Hill's plan with that annexed to the grant, both of which I have before me. I have felt it my duty to give this imperfect statement of one of the very peculiar features which distinguish this case. A review of the whole evidence satisfies my own mind that Mr. Hill discovered the true starting point, that his survey was correct, and that the grant to the McCully's is sufficiently defined and includes the land claimed by the defendant in his plea.

In answer to the plaintiffs grant, should the survey be sustained, defendant claims under a grant from the Crown dated October 30th, 1765, to John Saunders and others, and a plan or copy of plan purporting to be "a copy of Mr. Throop's third original plan of the township of Amherst, done from a scale of 40 chains to an inch. (N. B.—The lots above, number 69, were measured and laid out into lots, being the wilderness land or 300 acre lots which the persons marked in said lots are entitled to,—done in 1792 by Charles Baker, surveyor.") There is no evidence whatever of this copy of plan—made 27 years after the date of the grant—being a correct copy, nor is there any evidence that the plan came out of the custody of any public officer, or that it has been recognized or acted on by the proprietors of land in the township

as an authoritative document. The leading case on this point is *Songster* v. *Payzant*, Thompson's Reps., 403, which has been followed by other cases, one of them relating to the very plan; and on the authority of these cases there can be no doubt that this plan was properly rejected on the trial—if there were not other most serious objections to its reception as evidence. The grant is the same grant adjudicated upon by this Court in *Costin* v. *Chappel*, 1 R. & C., 42, in the following terms:—"In defence there was produced a grant dated 31st October, 1765, of 53½ shares, each containing 500 acres of land 'in the township of Amherst, according to the survey and present division of said township,' the grantees being John Saunders and others, and we were assured at the argument that this is the only grant on record, to be found, and that no partition exists of the lands in said township. A plan was produced at the argument purporting to be a plan of said township, but which the counsel of the defendant withdrew, as it was not reported to us as received at the trial. The grant of so extensive a territory, comprehending about 40 square miles, contains no metes and bounds, and refers to no plan or map, and in the absence of any survey, division, or grant of the township, appears to us insufficient to pass title."

The learned Chief Justice, SIR W. YOUNG, who delivered the judgment, would perhaps have been more literally accurate had he said that the grant referred to no plan or survey now existing, capable of being produced, for the grant conveys the 53½ shares "according to the survey and present division of the said township," from which it appears that there had been at that time a survey made and a plan of division prepared, but not, I think, necessarily importing that there had been any allotment of the areas on the plan of division, among the grantees; but neither that plan nor any authenticated copy of it is known to exist or ever to have existed by any evidence other than the words of the grant; nor is there any evidence in the case to prove or even render it probable that any partition was ever made by allotment, or otherwise, of the shares conveyed by the grant. The grant does not even state in what part of the township the shares were to be located, nor are we informed when or to whom or in what locality the large quantity of land in the township then

remaining ungranted were disposed of by the Crown. Mr. Rigby's very ingenious contention, based on this grant, in the able argument which he presented, was that the Crown having granted an undefined portion of the township, was tenant in common with the grantees of the whole township, and could not grant the remainder by metes and bounds, until there had been a partition between them and the Crown; and, as this was never done and the plaintiffs claim under a subsequent grant, the plaintiffs were tenants in common with the defendant and could not maintain ejectment. Undoubtedly, some foundation is to be found for this contention if the defendant is in a position to avail himself of it. *Hilliard*, I., 808, sec. 26, says, "It is to be observed that an alienation of the interest of one joint tenant, &c., either by deed or legal process, is not for all purposes void, but will operate against him and all claiming under him, by estoppel, whether he had notice or not, and can be avoided only by the co-tenant, who is injured, or those claiming under him." So that the defendant, before he can urge this defence, must show that he is a party injured, by tracing his title to the Crown. This he entirely fails to do.

The defendant, in this case, scarcely ventures to claim title in himself by possession; but the plaintiff claims by possession and introduces a large amount of evidence to sustain his claim. The nature and circumstances of the plaintiff's claim are very peculiar and novel, but still at least worthy of our consideration.

The land now in controversy is part of a much larger tract, belonging to plaintiff's father, which includes about 150 acres of what is now productive and valuable alluvial land, all of which is included in the grant of 1830. Some years before the passing of the grant in 1830, (some of the witnesses places it as far back as 1818,) the plaintiff's father, the Rev. Samuel McCully, commenced draining the land between the Dickson and Nappan Lakes and the Nappan River. The whole of this tract was then nothing better than a barren swamp, often completely covered with water, and utterly valueless for any useful purpose. Mr. McCully's operations consisted in constructing a series of canals, connected on one side with the Big or Nappan Lake and Dickson's Lake, and on the other with Nappan River, with the double purpose of carrying off

the surplus water from the swamp and flooding the land at high tide with the water of the Nappan River. This river is affected by the extreme tides of the head of the Bay of Fundy, and its waters are filled with the alluvial matter which, when deposited, constitutes the large and very fertile tracts of march in the counties of Cumberland, Colchester, Hants, Kings and Annapolis. The expectation was that this alluvial matter, being deposited on the swamp, would raise its level, solidify its surface and improve its drainage. A part of the plan was to use the Big Lake as a reservoir to receive and discharge the tide waters, and thus, by creating a strong return current from the lake, keep the canals and ditches from becoming choked. These works were kept in operation from about 1818 to 1830, and from that time the sons of Rev. Mr. McCully, the plaintiff in this cause, continued the work with success. The weight of the evidence goes to show that the canal did not reach the Big Lake until 1838 or 1839, when the McCully's called in the aid of the Commissioners of Sewers, a local board appointed by the Government under a Provincial Statute for such purposes. By them the canal appears to have been carried into the Big Lake, and other dykes and drains constructed at an expense of over $2500, which was assessed upon the plaintiff and other proprietors of low lands in the neighborhood, which were benefitted, the larger part of it being paid by the McCully's. This work has been continued and the dykes, canals, and ditches kept up, (several of them inside of the line claimed by defendant,) by the McCully's, apparently at their own expense, until the present day. Peter Noilles, (line 278,) says he cut a ditch from the canal into Big Lake for plaintiffs 18 years ago; and there is much more evidence of a similar character, while there is no evidence of any one else contributing at all since 1839. These are the prominent facts on which plaintiff claims title by possession on account of the canals and ditches. It is clear that they cannot claim for a period beyond the time—about 1839—when they were assisted in constructing sewers at the expense of the proprietors. But since that time they have kept up, altered and extended the canal system over the whole district, including land between the old line mentioned in the plea and the two lakes, comprising nearly the whole of

the defendant's claim west of the Big Lake. Do these acts of ownership, and especially the act of cutting the ditches, altering and maintaining them, and by their means covering them at spring tides, if not daily, with water from the river, constitute such a possession as enables the plaintiffs to acquire title in 20 years? I think they do. The plaintiffs had such control of the lands during this period of 39 years as to affect them more or less, twice every day, and twice every month at the spring tides their whole surface must have been covered. Their control was so practical and effectual as to raise the surface to the level of the adjacent marsh, and alter its character in course of years from a useless swamp, which could only be crossed by a team when it was frozen, to firm, productive and valuable land. So far as the value of the land is concerned, they may be said, by their practical sagacity and industry, to have created it. These works were going on for many years in and through lands claimed by defendant's grantors, without protest or rebuke from them, although they saw and knew what was going on, and I cannot help thinking that the doctrine of estoppel which was urged at the argument is fairly applicable to a case of this kind. The Dicksons must have known that plaintiffs were making expenditures on this land, believing it to be their own, and they had no right to stand by for 39 years, (without objection or protest,) until plaintiffs had made it valuable, and then turn round and dispute the plaintiff's title. At least I consider these proceedings to have formed one continued act and system of possession from 1839 to 1875, when defendant's possession commenced. The McCullys cut hay on different parts of the land as fast as it improved, but this part of it was not in a condition to yield sufficient hay to be profitable about 1848. They were in the habit of selling the hay at auction upon the land annually, and we have evidence of their cutting and selling east of the line claimed by defendant, from that time down to the time when defendant took possession, about 1875, a period of about 27 years. Jacob Noilles cut there under plaintiffs 30 years before the trial. John Gould lived near the place 22 or 23 years, and cut there every year except two or three. This must have been at least 20 years before the suit was commenced. Andrew Ripley cut there 15 years before the

trial, and several other witnesses show that the sale and cutting of hay there by plaintiffs was continued until defendant took possession; but this was not done without some opposition. James K. Noiles, one of defendants witnesses says, "In 1857 Thomas Dickson cut the grass, but it came wet weather and he left it on the ground; did not get the hay." This was when it was of little value, and it does not appear that the plaintiffs knew of his cutting. Dickson, it is proved, several times forbade plaintiffs and others from cutting. On one occasion Jacob Noilles paid him 25 cents for hay which he had bought from plaintiffs and moved. James Noilles, about 1861, paid Dickson $3 for hay which he had bought from plaintiffs for $5 or $6, and which Dickson prevented him from removing until he paid the $3. There is no proof that Dixon ever took hay off the land or made anything more than these one or two very trivial and desultory interferences with those who did, and the whole period covered by them extended only from 1857 to 1862. After 1862 I do not find that he made any further interference, and I do not think these interferences should be held to interrupt the continuity of the possession of plaintiffs who were, during all this period, selling the hay and keeping up the ditches and canals through the property.

After bestowing a great amount of care and labor on this perplexing case, I am able to say that, in my opinion, judgment should be entered for the plaintiff. On the question of title my conviction in his favor is very strong, and on the questions of possession and estoppel my conviction is only less strong because the peculiarity of the circumstances opens a wide field for diversity of opinion.

SMITH, J.—In this action, without referring to the documentary title under which the plaintiff claims, we think there is sufficient evidence of possession by him of the locus where the trespass was committed, to entitle him to recover. We think, therefore, the judgment should be for the plaintiff.

WEATHERBE, J.—On the point as to the effect to be given to the acts of possession, I entirely concur with the judgment read. On some points I had doubts, but it is not necessary to go into them.

ATTORNEY-GENERAL OF CANADA *v.* FLINT ET AL.

Before McDONALD, SMITH, JAMES and WEATHERBE, J J.

(Decided December 18th, 1882.)

Constitution of Courts.—Jurisdiction given to Vice-Admiralty Courts to enforce penalties for unlawful distillery.—Ultra vires.—*Prohibition.*

THE legislation of the Dominion Parliament (31 Vic. C. 8, S. 156,) giving the Vice-Admiralty Court jurisdiction in cases for the collection of penalties for illegal distilling, is *ultra vires*, and the Vice Admiralty Court, as an inferior Court, may be restrained by the Supreme Court by writ of Prohibition.

Defendants having been cited to appear in the Vice-Admiralty Court at Halifax, to show cause why penalties due for breach of the Dominion Inland Revenue Act, Acts of 1867, chapter 8, should not be prounced for, a rule was obtained by defendant's counsel, on affidavit, calling upon the Judge of the Vice-Admiralty Court, and the Attorney-General of Canada, to show cause before this Court why a Writ of Prohibition should not issue, directed to said Judge of said Court of Vice-Admiralty, to prohibit the said Court from further proceeding in the plaint or action. The rule was argued December 22nd, 1881.

Ritchie, Q. C., in support of the application, cites Dominion Acts 1867, chapter 8, sections 156-157. The penalties are sought to be recovered under this Act. In the first place the Court of Vice-Admiralty is an imperial court, created by an imperial statute, and has no jurisdiction beyond that given by the statute. The Dominion Parliament has no power to give jurisdiction to an imperial court, *Langlois* v. *Valin*, L. R. 5, Appeal Div., 115. By the British North America Act, section 129, this Court is expressly excepted from the control of the Dominion Legislature. The Court of Vice-Admiralty is created by 26 Vic., chapter 24, by which all other acts are repealed. On the same principle the Dominion Legislature might give jurisdiction to a court martial to try a man for larceny. The Court of Vice-Admiralty never had a jurisdiction such as that sought to be enforced here, *3 El. & El.*, 236; *Forsyth's Constitutional Law*, p. 94; *Berton's Reports*, (New Brunswick,) 410. There is a distinction in the act, even conceding the right, between a proceeding for forfeiture of goods, and a proceeding for the recovery of pecuniary penalties which must be recovered in a

different way. There was no proceeding to forfeit the goods. Penalties are to be sued for before any two justices, or a court of competent jurisdiction. The right of a man to trial by jury in a criminal matter should not be taken away unless it is clear that it should be. There is no appeal here except to the Privy Council, which, to a poor man, is virtually no appeal. Besides that, this is a proceeding by the Attorney-General of Canada, in which, even if he succeeded, he might recover no costs. I admit that if the law is clear this is no ground. The latest cases on the point of jurisdiction are *L. R.*, 7, Exch., 787; *L. R.*, 6 Q B., 729.

Sedgewick, Q. C., showed cause.—The first point we take is that there is no writ of prohibition from the Supreme Court of Nova Scotia to the Vice-Admiralty Court. The Vice-Admiralty Court is a branch of the Admiralty Court in England. (WEATHERBE, J.—We have the same jurisdiction as the Queen's Bench in England; if the Queen's Bench in England has jurisdiction to issue a writ of prohibition to the Admiralty Court in England; if the Admiralty Court came within our jurisdiction, we could issue such a writ here.) Well, I will not dwell on that point. The next point is that this is a proceeding on the part of Her Majesty, and Her Majesty can go into any Court she pleases independent of any statute. *Chitty on Prerogative*, 244; *Hume's Customs*, p. 368, section 11; also p. 396. (WEATHERBE, J.—All that is repealed and part of it re-enacted.) The point is that the action was for penalties, which are payable to the Queen, who has a right to go into what Court she pleases to collect them; *Attorney-General* v. *Walker*, 25 Grant's Ch. Rep., 233. That is a case under this very statute. *Corporation of London* v. *The Attorney-General*, 1 House of Lords, 460. The forms of the Court of Vice-Admiralty provide, expressly, for the recovery of penalties for violation of the revenue and navigation laws. The precise form is given for the recovery of a penalty such as this, p. 141. I was under the impression that the Court of Vice-Admiralty would have jurisdiction by virtue of the original warrants, but I have looked carefully into it and find I cannot sustain that contention. The next point is that the Dominion Act is constitutional and gives juris-

diction to the Court. There is a presumption in favor of the constitutionality of the act. The only method of determining whether a colonial statute, relating to matters in the colony, is constitutional or not, is whether or not it is repugnant to imperial legislation. Cites *Imperial Acts of 1865*, chap. 63; *Fisher's Dig.*, title *Colonial Law*. It seems to me there is no answer to this. If the Dominion Act is not repugnant to English Legislation it is valid. The Dominion Parliament may have power to confer jurisdiction on the Court of Vice-Admiralty without being able to compel that Court to accept the jurisdiction; but, if the Court accepts the jurisdiction conferred, and the Dominion Parliament have jurisdiction over the subject matter, the defendant cannot set up the unconstitutionality of the act. Cites *Valin* v. *Langlois*, 3 Supreme Court Reps., 1; *Todd*, 385. The B. N. A. Act has given absolute power to the Dominion Parliament to enact as many laws as are necessary; they, therefore, *sub modo*, can repeal imperial acts; our act is a copy of 3 and 4 William IV., chap. 59, sec. 64. Jurisdiction was given to the Court of Vice-Admiralty by 6 George IV., chap. 114, sec. 64. A writ of prohibition will not lie because there is no appeal.

Ritchie, Q. C., in reply.—The right of the King to go into any Court is restricted by the Statutes at Large, vol. 3, page 135; he must sue in the ordinary courts of justice. The Court must have jurisdiction, and this distinction is carried through all the cases. Provision is only made in the Admiralty Court for proceeding *in personam* in two cases, and the proceeding must be by warrant. There is no proceeding *in personam* for breach of the revenue laws, but the proceeding is *in rem* to condemn the thing seized, *Flat Book*, 20. The proceeding here is not to forfeit the goods, but the monition calls in the party to show cause why the penalties should not be forfeited. The Imperial Act of 1865, in relation to the constitutionality of colonial legislation, does not refer to an act like this, which, in effect, alters the jurisdiction of an Imperial Court, but to cases of conflicting legislation in relation to the same subject. The jurisdiction of the Court is altogether limited by the act creating it, 26, Vic., (1863,) chapter 24. (WEATHERBE, J.—Could not the Dominion Legislature give to the Collector

of Customs, for the time being, power to try Admiralty cases?) They would have to create a court. (WEATHERBE, J.—Could they give power to the City Court?) They could, I think, within the jurisdiction of the court. I don't know that they could give jurisdiction in excess of that now possessed by the Court. The statute should be strictly construed in favor of the party.

Sedgewick, Q. C.—The words "Act of Parliament" in the Imperial Act, giving jurisdiction to the Court, will include Acts of the Dominion Legislature.

WEATHERBE, J., now, (December 18th, 1882,) delivered judgment as follows:—

This was an application to us for a writ of prohibition to stay a suit in the Vice-Admiralty Court at Halifax. This Court was convened under the statute, the then Equity Judge, Mr. Justice RITCHIE, presiding, for the express purpose of obtaining the rule *nisi*, and the case, one no doubt of importance, was argued before my brothers, MCDONALD and SMITH, and myself in the second division. My brother, MCDONALD, previous to the attack of illness which still confines him to his house, had considered the subject, and we have been enabled to confer with him recently, and he has expressed his concurrence with us in a case to which we have given as much attention as the unusual number of cases before the Court would permit. Proceedings were taken in the Vice-Admiralty Court here *in personam* before the Judge Ordinary under the Canadian Act, cap. 8, 31 Vic., respecting inland revenue, to collect a penalty for illicit distilling. The principal clauses in question are the 155th, 156th and 166th, which are as follows:—

Section 155. Any duties of excise or license duties or fees payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, * * * and all such duties and license fees shall be recoverable with full costs of suit as a debt due Her Majesty, in any Court of competent civil jurisdiction.

Section 156. All penalties and forfeitures, incurred under this Act, or any other law relating to excise, may be prosecuted, sued for, and recovered in the Superior Courts of

law or Court of Vice-Admiralty having jurisdiction in that Province in Canada where the cause of prosecution arises, or wherein the defendant is served with process; and if the amount or value of any such penalty or forfeiture does not exceed five hundred dollars the same may also be prosecuted, sued for and recovered in any County Court or Circuit Court having jurisdiction in the place where the cause of prosecution arises or where the defendant is served with process.

Section 166. Provided always that any pecuniary penalty or any forfeiture imposed by this Act, whatever be the amount thereof, may be sued for and recovered with costs on the oath of any one competent witness in any Court having civil jurisdiction to the amount of such penalty or forfeiture, by Her Majesty's Attorney-General, or by any other person or officer thereunto authorized by the proper authority.

The jurisdiction of the Vice-Admiralty Court was disputed and the question was argued there, and in the judgment printed in the case before us, the learned Judge claimed the right to proceed with the cause. It is is admitted this penalty could be recovered in the Supreme Court. The learned Judge in giving judgment says:—"In the first case I was called upon to decide as *ex-officio* Judge of Vice-Admiralty, that of the City of Petersburg, *1 Oldright*, 815, in 1865, I had occasion to look into the question of jurisdiction, which has been so exhaustively and learnedly discussed by Judge STORY in *DeLovio* v. *Botl*, 2 Gallison, 398 to 476. That case depended a good deal on American legislation, having no effect here. The commission to my predecessors at Halifax and to the Judge at Quebec I also throw out of the case, having no commission myself, and regarding chiefly the Acts of Parliament. The practice and proceedings in this Court are founded mainly on the Imperial Act of 1832, the 2nd Will. 4, ch. 51, and the rules and regulations issued thereunder by Her Majesty in Council. Among these, section 27 relates to prosecutions for breaches of Revenue or Navigation Laws, which means, of course, such laws as were in force in the several colonies throughout the Empire, are and now in force therein. This section contains the following clause:—'In the case of a monition citing all persons in general, and not describing any person by name, no penalties can be pronounced for; but, if

the person by whom the offence was committed should afterwards be discovered, a subsequent monition may be issued in the same suit against him or them for the recovery of the penalties.' The principle stated in this clause, as well as in the note to our fee-table, folio 8, has a direct bearing upon the case in hand, and this rule, emanating from the Queen in Council, by virtue of the Act of Parliament, has the same authority as if it were in the Act itself. Much was said at the argument of the power of the Dominion Legislature over this as an Imperial Court, and no doubt if a Dominion Act were to attempt to give this Court a jurisdiction analogous to that of Admiralty Courts in the United States, and exceeding that of the High Court of Admiralty in England, I would have no difficulty in holding that such an Act was *ultra vires*, but it is very certain that no such Act will ever pass. What we are dealing with here is the recovery of penalties by a separate suit, after forfeiture of the goods, for breaches of the Inland Revenue Law of the Dominion. The 156th section of the Act provides that all penalties and forfeitures incurred under the Act may be prosecuted, sued for and recovered in the Superior Courts of Law, or the Court of Vice-Admiralty having jurisdiction in the Province where the cause of prosecution arises. For the reasons I have assigned, I am of opinion that this Court has jurisdiction, that the 156th section of the Act is not *ultra vires*, and that the objection now taken cannot prevail."

We were all satisfied, before granting the rule *nisi*, that the Vice-Admiralty Court is, under the authorities, an inferior court, to restrain which this Court, having like powers with the Supreme Court of Westminster Hall, by the express words of our statute, may grant a writ of prohibition, and nothing has been said to shake this opinion. Indeed, the argument turned mainly upon the interpretation of the Canadian Act, and the power conferred on the Dominion to impose a duty on a court admittedly not a Dominion Court. That the Parliament of Canada has power to create a Court for the whole Dominion for the recovery of these penalties is not doubted. Plaintiff's counsel goes further and submits that we are concluded by authority of the Supreme Court of Canada on this very point, citing the case of *Valin* v. *Langlois*,

3 Canada Supreme Court Reps., page 1; L.R., 5, App. Cases, 115. Some discussion took place as to the effect of that case, and there can be no doubt it is a binding authority on us requiring us to exercise jurisdiction over all election petitions respecting elections of members for the House of Commons. That was the disputed point in the case decided by the Supreme Court of Canada. There was a petition for leave to appeal to the Privy Council, and such leave was refused. We were directed to some expressions of the learned Judges in the Supreme Court of Canada, to the effect that it is competent to the Parliament of Canada to interfere with the organization and procedure of Provincial Courts in certain cases, notwithstanding the legislation on these subjects is assigned exclusively to Provincial Legislatures. The question was whether the Parliament of Canada had, in reality, created a new tribunal, or imposed duties on a Provincial Court, and, in dismissing the appeal, Lord SELBORNE, in referring to the disputed language, says:—"Words could not be more plain than those to create this as a new Court of record, and not the old Court with some superadded jurisdiction to be exercised as if it had been part of its old jurisdiction." Beyond this I will not say there is not enough to be gathered from the case to conclude us, were this Vice-Admiralty Court a Provincial Court, on the ground that even where the Canadian Act only commits the exercise of a new jurisdiction on a matter within the exclusive power of the Parliament to a Provincial Court it is competent for Parliament to pass such an Act,—to conclude us and relieve us from the difficult task imposed on the higher Courts of reconciling the conflicting words of the statute. It is admitted that where the Canadian Act, by its terms, says that a duty on distilling, or a license fee, or a penalty shall be a debt, recoverable as such, that it may then be recovered in any Provincial Court like any other debt, because the Dominion has power to make that thing a debt, and the Provincial Court has jurisdiction over all debts. It is denied, however, that the Provincial Court could be affected by the Canadian Act to make this debt collectable by one procedure, while other debts created by our own or foreign laws are collectable by a different procedure in the same Court, unless the words imported the erection of a new tribunal. And it was suggested

that it had escaped observation that the B. N. A. Act does not say that new jurisdiction shall not be imposed; that it is only the organization, maintenance, and procedure that are assigned exclusively to the Province in Provincial Courts. The Provincial Court, no one ever doubted, must undertake the duty of adjudicating upon any debt, even that contracted in a foreign country and imposed under foreign laws. Has the Dominion power to require any Provincial Court to deal with any specified debt? Is it competent to say, for instance, that our Probate Court shall try all questions of promissory notes and all disputes relating to ships unless by the words used an intention is manifest to set up a new tribunal, that is, to make the Provincial Court a new Court, (as Lord SELBORNE interprets the language of Parliament in relation to elections,) to adjudicate upon questions of negotiable paper or shipping? Cannot every word of the B. N. A. Act be reconciled by giving any Provincial Court, with its own machinery, authority to administer a remedy for everything coming within matters not exclusively assigned to the Provinces, declared by the Canadian Parliament to be a wrong, in the legal sense of these words "remedy" and "wrong," in just the same way that the Provincial Court now supplies the remedy? On the one hand we were told that all this has been settled, and on the other that most of the questions suggested remain undisposed of. We are cautioned in the *Citizens' Insurance Company* v. *Parsons*, by the judgment of the Privy Council, to decide in each case of dispute as to the distribution of powers, only what is before us, only what is necessary in the particular question in hand, without attempting unnecessary interpretation, a wholesome rule, I should say, for courts to adopt in all cases. We are not much assisted, perhaps, by the discussions and decisions involving the distribution of powers, because there does not seem to be any language in the B. N. A. Act assigning power to the Province which renders the disputed enactment *ultra vires* as affecting that distribution. This appears to be an entirely different question. I suppose if the Province were to assign the recovery of a penalty for breach of one of its own laws, on a subject within its exclusive power, to the Vice-Admiralty Court that would be the same question that is now before us. At any rate, if the

Province, previous to Confederation, had assigned such duty it would be so. Could the old Provinces impose a duty on the Imperial Court? Could Australia do so?

One view may be taken of section 156 in which, though the Vice-Admiralty Court cannot act, yet it could hardly be said that the clause in question is *ultra vires*. May it not be that the Dominion Parliament intended to give permission, so far as Parliament could, to the Imperial Court—this Vice-Admiralty Court—to exercise jurisdiction, leaving it to the Imperial Parliament, which created the Court, to confer the jurisdiction? I suppose no one will doubt that, by amendment of the Imperial Act permitting the Vice-Admiralty Court to exercise the disputed jurisdiction, it could then be exercised in this very case by virtue of both Acts. However that may be, we have now to say whether this Vice-Admiralty Court, organized and clothed with peculiar power and procedure by an Imperial Act, can be set in motion with new powers and a different procedure by a Colonial Act passed by the Canadian Parliament. The Legislature of the United States has made certain debts, promissory notes, recoverable in the Admiralty Court of that county, and the learned Judge of the Vice-Admiralty Court in his decision claiming the disputed jurisdiction, seems to admit that it would have been *ultra vires* for the Dominion to have required this Vice-Admiralty to have adjudicated upon such matters because that exceeded the jurisdiction of the High Court of Admiralty in England. The jurisdiction of this Vice-Admiralty Court was derived from the English statute.

With the greatest deference to the learned Judge, Sir William YOUNG, we think that the admission in his judgment respecting the want of power in the Canadian Parliament to require collection of promissory notes in the Vice-Admiralty Court at Halifax, if good law, is fatal, and that this jurisdiction now claimed, if allowed, must be allowed upon the main ground taken by Mr. Sedgewick, that the Canadian Parliament had the right to empower the Court below to deal with the penalties in question—not on account of any power it derived by virtue of its being an Imperial Court, and thereby having jurisdiction already over the general subject of internal revenue, (which cap. 24, 26 Vic., of the English Acts does not

show), but on the broad ground that the Parliament of the Dominion is not to be limited in organizing, adopting, or selecting its tribunal or procedure for the trial of any matter over which it has exclusive right to legislate, that its power is not even to be confined to creating new courts or clothing established provincial tribunals with any authority it sees fit, but, that it may require any Imperial Court having jurisdiction of any kind in this country—and even in one Province of the Dominion—to exercise jurisdiction of another kind altogether, and adopt a new procedure, and hear evidence which in no other case would be heard, and even to impose a duty on the war and naval authorities on this station requiring, for instance, the Courts—Courts Martial—which have been erected by the Imperial power for particular purposes, to try offences against regulations of the service, to try questions of Canadian militia, revenue or shipping. I distinctly submitted a suggestion of this to counsel at the argument, and we did not understand, and cannot now understand that it can be denied to be the necessary result of the argument presented to us. Mr. Ritchie took the ground that the defendant, belonging to this Province, had the right to be tried for this penalty by the Court of the Province, the *forum domicilii*, I suppose in the ordinary way and by a jury, and that the present proceeding is an invasion of his civil rights and a violation, as I understand his contention, of clause 13 of section 92 of the B. N. A. Act. Before the passing of the B. N. A. Act no penalty could be recovered for a violation of a revenue law, or indeed for any penalty, except by a trial by jury. I suppose the Province had then, and has now, the right to deprive a citizen of trial by jury, but the argument is that it would be an invasion of the right for the Dominion Parliament to interfere in this way. Admitting the power of the Dominion to use the Vice-Admiralty Court and adopt procedure, it follows that the trial may be in any form specified. And as for the case of a Dominion Court established for Dominion purposes, no doubt an inhabitant of any Province may be tried without a jury if the Parliament ordains it. Another point was taken. In this case, before the Vice-Admiralty Court, the proceeding is *in personam* and not *in rem*, and proceedings *in personam* do not seem to have been

contemplated by the procedure in the Vice-Admiralty Court, and even if section 166 be *ultra vires* the jurisdiction in this view intended to be conferred, it was contended, was only in relation to the forfeiture involving proceedings *in rem* and not to the penalties which were to be collected by the other tribunals provided in the clause. Upon the whole case we have to say that if the words purporting to confer jurisdiction on the Vice-Admiralty Court can be construed to relate to penalties as well as forfeitures, then looking at the Act respecting Inland Revenue, and the authority under which the Parliament of Canada exists and acts, we cannot come to the conclusion that the Imperial Legislature ever contemplated in clothing that Parliament with power to make laws for the Government of Canada, that it should pass an act conferring a new jurisdiction upon the British Vice-Admiralty Court and require that Court, without further Imperial Legislation, to adjudicate upon such a matter as this collection of penalty, and under the forms and by the evidence prescribed, and, we think, the rule must be made absolute.

SMITH, J., concurred.

JAMES, J., also concurred, though with some little doubt.

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Held, that plaintiff was entitled to recover for the whole year, including the period during which no advertisement was published.

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1. Plaintiff brought an action against defendant for the price of a horse, and the declaration contained also the common counts. It appeared that the horse had been sold, not to defendant, but to a third party, from whom defendant received $65, to be paid to the plaintiff. He paid only $52, used the balance of $13 for his own purposes, and told plaintiff he would give him the balance. He afterwards claimed a set-off against plaintiff, of which there was no plea.

Held, that in the absence of a plea to the jurisdiction, as required by the County Court Act, plaintiff was entitled to recover the $13 under the money counts, and that the judgment for defendant should be reversed. MCDONALD, J., dissenting.

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2. The defendants, an insurance company, gave a power of attorney to their agent, whereby they constituted him their true and lawful attorney, to act as the agent and receiver of said company, and for that purpose to effect insurances on behalf of the company, and the power of attorney conferred other powers necessary to the ordinary working of such a company. The agent deposited with the plaintiff, a banker and broker, and bought exchange, &c., the account being kept in the name of the company, and, in the course of the transactions, he became indebted to the plaintiff in the sum of $314.18, for which action was brought.

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Plaintiff brought an action against a magistrate for maliciously refusing an appeal; but on his direct examination stated merely that he had demanded an appeal, and that nothing further was said. Defendant swore that he did not hear the appeal demanded. Plaintiff's attorney swore that in the defendant's presence he had asked plaintiff if he had not offered to make the affidavit and demanded an appeal, to which plaintiff had replied that he had done so. The jury, in answer to the question whether the justice had been required to prepare an affidavit, said "yes," and in answer to the question whether the justice had acted with malice, replied "apparently;" and they found a verdict for plaintiff.

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See PRACTICE—Appeal from County Court.

——— FROM MUNICIPAL COUNCIL.

See ASSESSMENT OF SHIPPING.

——— IN INSOLVENT DEBTOR'S CASE.

See PRACTICE—Appeal from Commissioners.

——— UNDER INSOLVENT ACT OF 1875.

See INSOLVENT ACT OF 1875.

ARBITRATION.

Defendant appealed from an order referring a cause to arbitration at the instance of plaintiff, on the ground that there was a plea of negligence in the conduct of the services for which the action was brought; but it was not shown that the defence would really be

raised. It was also argued that the Judge had no jurisdiction to refer the cause to arbitration after a demand made for trial by jury, but this ground was not taken in the rule for appeal.

The appeal was dismissed.

Eaton v. *Rowe* 274

See also AWARD.

ASSESSMENT, APPEAL FROM.

Rule to quash an assessment of defendant's property discharged with costs where defendant appealed against his assessment and showed that it was excessive relatively to certain others named. The proper remedy in such a case, under the by-laws of the Town of Windsor, is to appeal against the other assessments as too low.

Wiggins v. *Town of Windsor* 256

——————— OF BANKS.

See BANKS, Taxation of.

——————— OF SHIPPING.

1. By the *Revised Statutes*, (4th Series, 1874,) an appeal from an assessment was given to the Court of Sessions. In 1876 it was enacted that any party aggrieved by the decision of the Sessions could appeal to the County or Supreme Court. In 1879 the powers and authorities of the Sessions were "given to the Municipal Councils."

Held, that the power given to the Council to hear appeals from the assessment under this statute was subject to the condition that an appeal should lie to the County Court in the same manner as formerly from a decision of the Sessions.

The appellant appealed to the County Court against an assessment of $5,000 on "ships in other districts," which had been built but were not registered in the county in which they were assessed, and the County Court Judge, on the authority of *Kenny* v. *City of Halifax*, decided that they were not liable, but as it was shown on the trial of the appeal that the appellant had a ship on the stocks, partially built, he amended the assessment to cover half the value of the said ship.

Held, that the Judge was correct in his judgment as to the non-liability for shipping out of the county, and that he could not, on the trial of that appeal, consider a different item of assessment, not submitted to the Court at all, as to the ship on the stocks, and the appeal must, therefore, be allowed.

In Re Assessment of James Crowe 301

2. *Held*, that a vessel registered in the port of Halifax and owned by a trader resident at Isaac's Harbor, which was not at the time of the assessment in the district of Isaac's Harbor or the County of Guysboro', was not assessable in the district of Isaac's Harbor for County rates.

JAMES, J., dissenting.

In Re Effie Sweet 380

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See CLOUD ON TITLE.

ASSOCIATED COUNSEL, RIGHT OF TO BE HEARD.

See PRACTICE—Counsel.

ATTACHING CREDITOR, LIABILITY OF FOR ASSIGNEE'S COSTS.

See INSOLVENT ACT OF 1875.

ATTACHMENT.

Plaintiff, as assignee of J. S. McD., to whom defendant was indebted, attached certain goods of the debtor. Chattel mortgagees sought to set aside plaintiff's attachment on the ground that the debt was not "justly due" and "payable" to plaintiff, as there had been no notice given by plaintiff under R. S., cap. 94, sec. 357.

Held, that notice was not necessary in order to enable plaintiff to attach.

Parsons v. *Maclean* 405

——————— OF POLICY OF INSURANCE.

See GARNISHEE ORDER.

AWARD.

Plaintiffs brought action on a policy of Marine Insurance, which contained a clause providing that in case of dispute the claim should be submitted to arbitrators. Defendants contended that the plaintiffs had no insurable interest, and the dispute was, according to the terms of the policy, submitted to arbitrators, who made an award in favor of the plaintiffs.

Held, that the Court could not go behind the award to ascertain whether plaintiffs had an insurable interest.

Troop et al. v. *Anchor Marine Insurance Company* 234

See also ESTOPPEL BY SUBMISSION AND AWARD.

BAIL, OBJECTION TO TAKEN AT ARGUMENT TOO LATE.

See PRACTICE—Bail, &c.

BAIL-BOND, SUIT ON.

See PRACTICE—Appeal from County Court, 5.

BANKS, TAXATION OF.

The Local Legislature has authority to enact a law imposing a tax on the Dominion notes held by a bank as portion of its cash reserve, under the Dominion Act relating to "Banks and Banking," (34 Vic., c. 5, s. 14,) and under the by-laws of the Town of Windsor such property was held to be properly included by the assessors in their valuation.

Town of Windsor v. *Commercial Bank of Windsor* 420

BETTING AGENT.

An action was brought to recover $100 placed by plaintiff in the hands of the defendant for the purpose of betting on a boat race. The bet was made in the plaintiff's name, but the money was contributed by several parties in small sums, and, although no arrangement was made, plaintiff stated in his evidence that the several parties were interested to their respective amounts, and if he had won they would have expected their money and he would have been obliged to pay them. Plaintiff countermanded the bet before the defendant parted with the money, and there was no clear evidence to shew that defendant, as betting agent for plaintiff, had become bound before the bet was so countermanded.

Held, that the contributors could not sue jointly, but that plaintiff was entitled to recover back, not the whole amount, but only his own share of the money deposited, for which judgment must be entered in the Court below.

Ross v. *Harrington* 225

BILL OF EXCHANGE.

Plaintiffs, as indorsees, sued defendant as drawer of a foreign bill, alleging that the bill was duly presented for acceptance and dishonored and defendant had not any effects in the hands of the drawees nor any reasonable ground for expecting that he would have or that the bill would be honored, and that defendant had sustained no damage by reason of having no notice of the non-acceptance. Defendant demurred, on the ground that plaintiff was bound to give notice to defendant of non-acceptance, or hold the bill till due and again present it for payment before sueing, and to allege accordingly. Demurrer overruled.

Stayner et al. v. *Howatt* 26

See also NOTICE OF DISHONOR.

BOND FOR SALE OF LAND.

Defendant entered into a bond to plaintiff under seal in which it was recited that plaintiff had agreed to purchase from defendant a tract of land for $1200, with interest as follows, one year's interest to be paid in one year from date of bond, one year's interest in two years, and one year's interest, together with principal, in three years. It was further specified that if default should be made in the payment of the principal or interest as agreed upon, plaintiff should become a tenant to defendant at an annual rent of $72, and that all payments made by plaintiff, or upon certain specified notes of hand endorsed by way of security for the purchase money, should be applied to the interest or rent, as the case might be. Another part of the agreement stated that whatever sums were applied, as aforesaid, the remainder should be applied to reducing the principal sum; and further, that in the event of plaintiff failing to pay as aforesaid and surrendering up the premises at the end of the three years, all payments made in that case being applied towards rent at the rate aforesaid, the said note and the said endorsed note shall be given up by the said defendant, &c.

Held, that plaintiff was entitled to recover the amount that he had paid defendant over and above the amount appropriated towards the rent for the period for which he occupied.

Holmes v. *Davison* 61

BUILDING CONTRACT, BOND FOR PERFORMANCE OF.

In an action against the principal and sureties on a bond to the plaintiff for the payment of the cost of a house which the plaintiff was to build for the principal, it appeared that the work was not done in strict pursuance of the agreement and specifications. The plans referred to in the contract, and which were part of it, were not put in evidence. The person employed by the inspector named in the contract, who was to superintend the work, was superseded by another by plaintiff without the consent of the defendants.

Held, that plaintiff could only recover on a *quantum meruit*, and that, as there was not sufficient evidence to enable the jury to determine how far the contract had been departed from, and as the sureties could not be bound by the appointment of the new inspector, the verdict for plaintiff must be set aside.

Felch v. *Ritchie et al* 407

CERTIORARI.

See PRACTICE—Certiorari.

CHAMBERS, POWER OF JUDGE AT.

See PRACTICE—Rule Returnable on Circuit.

CHOSE IN ACTION, ATTACHMENT OF WITHOUT NOTICE.

See ATTACHMENT.

CITY COURTS, JURISDICTION OF.

An action was brought against the defendant, in the Police Court, at the suit of the City of Halifax, for an alleged violation of a city ordinance in keeping *a marine and junk store* without license therefor, and, after trial, the defendant was convicted of keeping *a rag and junk shop* without license.

Held, per WEATHERBE and RIGBY, JJ., that the conviction was bad in that the offence for which the defendant was convicted was different from that charged in the summons.

Per RIGBY, J., that the criminal side of the City Court had jurisdiction over the subject matter, and could afford complete redress, and that the prosecution was wrongly instituted in the Police Court at the suit of the City.

City of Halifax v. *O'Connor* 190

CITY TAXES, LIEN FOR.

See INSOLVENT ACT OF 1875, 6.

CLAIM AGAINST INSOLVENT ESTATE, FILING SECOND.

See INSOLVENT ACT OF 1875, 5.

CLOUD ON TITLE.

Rogers & Co., on the 10th of May, assigned all their individual and partnership property, both real and personal, to a trustee, for the general benefit of their creditors, and executed at the same time a deed in trust to him of their lands, which was recorded the 12th of May. Defendants entered a judgment against Rogers & Co. on the 15th of May, which was recorded the next day. On the 17th of May a writ of attachment was issued against Rogers & Co., under the *Insolvent Act of 1875*, and in June creditors' assignees were appointed, to whom the trustee subsequently conveyed the lands, which were afterwards sold to certain of the plaintiffs, in trust to secure the purchase money to the creditors' assignees. Defendants proceeded to advertise and sell the land under execution, and plaintiffs sought to restrain them by injunction.

Held, that, as between the parties to it, the deed from Rogers & Co. to the trustee was valid, and that it was open to the creditors' assignees, if they considered it for the benefit of the estate, to have the property conveyed to them by the trustee; that the judgment creditor never obtained any lien on the property under his judgment; but that, although the Court would restrain a judgment creditor from selling property, even under a judgment that would convey no title to the purchaser, and where the creditor only proposed to sell the right, title and interest of the judgment debtor, yet it was incumbent on the plaintiffs to show that the cloud on their title was caused by what was apparently a good title, though in fact defective, and that in the present case defendants had not an apparently good title, as the first deed from Rogers & Co. appeared to convey the title.

WEATHERBE, J., concurring, limited his opinion with reference to the effect of the deed from Rogers & Co. to the trustee, to the case of a naked conveyance by the insolvent for the benefit of creditors.

Johns et al. v. *Barbour et al.* 43

COMMISSIONER OF MINES, APPEAL FROM.

See APPEAL FROM COMMISSIONER OF MINES.

COMPANY, NOTE GIVEN BY.

In an action brought by indorsees on a promissory note signed by defendants as President and Secretary of a company, the Judge of the County Court found that at the date of the note the company was not incorporated, and rejected evidence offered by plaintiff to show that at the time of negotiating the note the company was incorporated.

The judgment for plaintiff was appealed from and the appeal dismissed.

Jardine et al. v. *Rowley et al.* 244

COMPOSITION, UNDER INSOLVENT ACT OF 1875.

See INSOLVENT ACT OF 1875, 5.

CONDITION, WAIVER OF.

See INSURANCE, FIRE.

CONSTRUCTIVE TOTAL LOSS.

A vessel was stranded at the mouth of Shelburne harbor, which she was seeking to enter under stress of weather, being on a voyage from Sydney, C. B., to Boston. The harbor was frozen for four miles from the town, and the hull, rigging and hawsers were encumbered with ice. Her steering apparatus parting, she struck on the rocks and became stranded early in the morning of Saturday, at nearly high water. Notice of abandonment was given in Halifax on behalf of the owners on the evening of the following Monday, to which the underwriters replied declining to accept it without further particulars, and the vessel was sold on Tuesday, after the master had communicated with the owners. Evidence was given that the tide did not suit on Saturday to make any effectual attempt to float the vessel, and that the drift ice prevented getting out more than one anchor; and there was evidence that all that was useful had been done on that day, that on Saturday night she filled with water, and that on Sunday, a gale coming on, she was bilged. On Monday a winter gale was blowing with heavy sea breaking over the vessel, so that the crew could not survive on board. The vessel was grinding on the bottom and was in danger of going to pieces, so that experienced people thought she was in a hopeless condition. Afterwards, by the aid of a favorable tide, and by a vessel, not available when the notice of abandonment was given, she was got off and repaired. The Judge who tried the cause without a jury, found for plaintiff, and the Court refused to set the verdict aside.

Corbett v. *Providence Washington Insurance Company* 109

CONTEMPLATION OF INSOLVENCY.

See INSOLVENT ACT OF 1875, 2.

CONVICTION FOR OFFENCE DIFFERING FROM INFORMATION.

An action was brought against the defendant, in the Police Court, at the suit of the City of Halifax, for an alleged violation of a city ordinance in keeping *a marine and junk store* without license therefor, and, after trial, the defendant was convicted of keeping *a rag and junk shop* without license.

Held, per WEATHERBE and RIGBY, JJ., that the conviction was bad in that the offence for which the defendant was convicted was different from that charged in the summons.

Per RIGBY, J., that the criminal side of the City Court had jurisdiction over the subject matter, and could afford complete redress, and that the prosecution was wrongly instituted in the Police Court at the suit of the City.

City of Halifax v. *O'Connor* 190

COSTS OF APPEAL.

See PRACTICE, Costs.

——— OF OFFICIAL ASSIGNEE.

See INSOLVENT ACT OF 1875, 1.

COUNSEL, RIGHT OF ASSOCIATED, TO BE HEARD.

See PRACTICE, Counsel.

COUNTY COURT, APPEAL FROM.

See PRACTICE—Appeal from County Court.

COURT OF RECORD.

See JUDGMENT IN *Tupper* v. *Murphy*, 173.

CREDITOR, DEFINITION OF, IN INSOLVENCY PROCEEDINGS.

On an application to confirm a deed of composition and discharge under the Insolvent Act of 1875, a creditor appeared to oppose the discharge, who had not filed his claim, though he was mentioned in the list annexed to the affidavit accompanying the insolvent's petition, and notice of the application had been sent to him.

Held, that the claimant was a creditor within the meaning of the Act for the purpose of opposing the discharge.

In Re Creighton, 1 R. & G., 211, overruled.

In Re John Bauer 149

CROSS-EXAMINATION OF WITNESSES STOPPED, GROUND FOR APPEAL.

See APPEAL FROM COMMISSIONER OF MINES.

DAMAGES IN ACTION FOR ESCAPE.

See ESCAPE.

DECEIT, ACTION FOR.

See REPRESENTATION AS TO CREDIT.

DEED, PROOF OF DELIVERY OF.

See DELIVERY OF DEED, &c.

DEFAULT.

See PRACTICE—Default.

————, OPENING JUDGMENT BY.

See PRACTICE—Opening judgment by default.

DEFENCE ON THE MERITS.

See PRACTICE—Opening judgment by default.

DELAY IN PLEADING, ACCOUNTING FOR.

See PRACTICE—Opening judgment by default.

DELIVERY OF DEED, REGISTRY NOT *prima facie* PROOF OF.

The question in an action of ejectment turned on the execution of a deed from one H. M. to R. M. Plaintiff produced no other evidence to the jury than the certified copy of the Registry, under *Revised Statutes*, cap. 96, sec. 33; and the grantee swore that he had never seen the deed from his father. The Judge who tried the cause left it to the jury to find, from the registry as *prima facie* evidence, that the deed had been executed.

Held, that this was a misdirection, and that there was no evidence of the delivery of the deed.

Gammon Joudrey, 2 R. & C., 314, questioned.

McDonnell et al. v. *McMaster*..... 372

DEMAND AND REFUSAL IN TROVER.

The plaintiff, as assignee in insolvency, brought an action of trover for goods which had been conveyed by one Renwick to defendant, in contemplation of insolvency. The goods had been sold by defendant before action brought.

Held, that evidence was not necessary of a demand and refusal.

Bligh v. *Darling*..... 248

DISCHARGE, WHO MAY OPPOSE.

See CREDITOR, Definition of.

DISCRETION OF JUDGE.

See FRESH EVIDENCE.

DISHONOR, NOTICE OF.

See NOTICE OF DISHONOR.

DIVERSION OF A STREAM.

See EVIDENCE, VERDICT AGAINST.

ENCROACHMENT ON STREET.

See head-note p. 321

EQUAL DIVISION OF COURT.

The Court being equally divided on the rule for new trial, the rule dropped.

Embree v. *Noiles* 82

EQUITABLE REPLICATION WITHOUT LEAVE.

See PLEADINGS, Departure.

ESCAPE, DAMAGES IN ACTION FOR.

In an assessment of damages after default in an action against a sheriff for an escape, the Coroner directed the jury that if the debtor had been allowed to escape through any negligence in taking the proper precaution to prevent such on his part, they were bound to find the full amount, "or at least heavier damages."

Held, that this was a misdirection, the proper measure of damages being the pecuniary value of the custody at the moment of escape.

McRae v. *Dunlop* 315

ESTOPPEL.

In an action against the City for removing plaintiff's steps, it appeared in evidence that when the City Engineer called on plaintiff in reference to the alleged encroachment on the street, plaintiff asked the Engineer to give him the line of the street, whereupon the Engineer marked it on the corner of the steps with a pencil. Defendant's counsel contended that plaintiff was bound by this proceeding, under section 270 of the Act of Incorporation, and that, not having appealed under section 271, he was estopped.

Held, that the defendant could not take advantage of the estoppel, not having pleaded it.

Evans v. *The City of Halifax* 321

——————, BY SUBMISSON AND AWARD.

The surviving executor cited the parties interested in the estate of deceased to attend for the purpose of a final settlement, and a preliminary question was raised as to whether all matters in dispute had not been settled by an award. The award in question resulted from a submission to which the executor and executrix alone were parties, and recited differences between those parties only. It appeared that other parties than those were interested in the estate, viz., the children and the creditors of the testator.

Held, that, whether the parties to the submission were or were not estopped, as there were other parties interested, the Judge of Probate should have overruled the preliminary objection and decided upon the evidence independently of the submission.

In Re Estate of George Smithers 306

EVIDENCE, CONFLICTING.

Plaintiff brought an action against defendants for injury to her luggage on defendants' steamship, caused by the breaking of a dummy, or side-light, and the alleged negligence of defendants' servants. Conflicting evidence was given on the question of negligence, and a general verdict was found for the plaintiff, which the Court refused to disturb.

Wood v. *Allan* 211

EVIDENCE, LEFT TO JURY AS QUESTION OF LAW.

An action of trover was brought for three sheep, two of which plaintiff alleged that she had brought with her to the residence of one McKay, with whom she was living when they were taken, and one of which she had purchased when there. The sheep were seized as the property of McKay. McKay and his sister with another witness gave evidence substantially the same as that of the plaintiff as to the property in the sheep and the mode in which it had been acquired. There was evidence that the sheep bore McKay's mark, and a witness for defendants testified that plaintiff had admitted that McKay had appropriated to his own use her sheep, and said he was to have given her others, but had not done so, and that he understood plaintiff's sheep had been killed. The Judge, after referring to the conflicting evidence, told the jury that if the defendants' evidence was true, it was matter of law that the sheep were not the plaintiff's, and he recommended them to bring in a verdict for defendants upon this ground if they took the same view of the evidence, adding that it would be better for the parties that the jury should follow the law, as a departure from the rules of the Court would only tend to prolong litigation.

Held, that the verdict must be set aside on the ground of misdirection.

McLellan v. *Ingraham et al*..... 164

——————— OF ESTOPPEL, INADMISSIBLE WITHOUT PLEA.

See ESTOPPEL.

———————, VERDICT AGAINST.

In an action for damages to plaintiff's mill property and privilege by a dam erected lower down the stream and the diversion of a brook in such a manner as to raise the surface of the water in the pool below plaintiff's mill and so interfere with the working of his mill wheel, the jury found for the defendant. The Judge who tried the cause, after a lengthy analysis of the evidence, concluded that there was not a single material fact in the case in favor of plaintiff which was not conclusively shown by the witnesses for the defence.

Held, that the verdict must be set aside.

Per RIGBY, J., that the conclusion arrived at by the jury was not a conclusion at which reasonable men ought to have arrived on the evidence before them, and that they had decided the issues submitted to them without giving sufficient weight to the uncontradicted testimony in favor of plaintiff.

Dwyer v. *Gasper*..... 344

FIRE INSURANCE.

See INSURANCE, FIRE.

FRESH EVIDENCE.

The County Court Judge gave judgment for defendant on appeal from the Magistrates, and afterwards granted a new trial on the ground of surprise and the discovery of new evidence. The only element of surprise consisted of the fact that a witness not examined in the Magistrates' Court had given evidence in the County Court.

Held, that the discretion of the Judge had been unwisely exercised in granting a new trial. and that there was an appeal under section 90 of the County Court Act, 1880.

Overseers of the Poor v. *McKenzie*..... 259

GARNISHEE ORDER, POLICY OF INSURANCE ATTACHED UNDER.

A garnishee order was made April 7th, at the instance of plaintiff, attaching an amount alleged to be payable to defendant under a policy of insurance. On application by the agent of the Company for delay, on the ground that the loss was not admitted and that he wished to get instructions from the Company, an order was made that the garnishee should not be required to pay the money until the further order of the Court, and that in the meantime the debt should remain attached. On 11th October, the Company having in the meantime admitted the debt and paid it over to the assignee of the claimant, the Judge made an order *nisi* for the payment of the money to the judgment creditor, which he afterwards made absolute, holding that the garnishee, after assenting to the order of April 23rd, was estopped until that order was rescinded from raising the question that a policy of insurance could not be garnisheed, and that the proof of loss having been satisfactorally made, the amount became attachable as an existing and acknowledged debt which the garnishee had paid over to the assignee at his peril.

Held, that the policy was not attachable under the garnishee order issued in April, and that nothing had afterwards occurred to alter the legal relations of the parties.

Popham v. *Cahoon*..... 277

INDORSEE, ACTION BY, AGAINST DRAWER.

See BILL OF EXCHANGE.

INJUNCTION TO RESTRAIN SALE UNDER EXECUTION.

Rogers & Co., on the 10th of May, assigned all their individual and partnership property, both real and personal, to a trustee, for the general benefit of their creditors, and executed at the same time a deed in trust to him of their lands, which was recorded 12th of May. Defendants entered a judgment against Rogers & Co. on the 15th of May, which was recorded the next day. On the 17th of May a writ of attachment was issued against Rogers & Co., under the Insolvent Act of 1875, and in June creditors' assignees were appointed, to whom the trustee subsequently conveyed the lands, which were afterwards sold to certain of the plaintiffs who conveyed to others of the plaintiffs in trust to secure the purchase money to the creditors' assignees. Defendants proceeded to advertise and sell the land under execution, and plaintiffs sought to restrain them by injunction.

Held, that as between the parties to it the deed from Rogers & Co. to the trustee was valid, and that it was open to the creditors' assignees, if they considered it for the benefit of the estate, to have the property conveyed to them by the trustee; that the judgment creditor never obtained any lien on the property under his judgment; but that, although the Court would restrain a judgment creditor from selling property even under a judgment that would convey no title to the purchaser, and where the creditor only proposed to sell the right, title, and interest of the judgment debtor, yet it was incumbent on the plaintiffs to show that the cloud on their title was caused by what was apparently a good title, though in fact defective, and that in the present case defendants had not an apparently good title, as the first deed from Rogers & Co. appeared to convey the title.

WEATHERBE, J., concurring, limited his opinion with reference to the effect of the deed from Rogers & Co. to the trustee, to the case of a naked conveyance by the insolvent for the benefit of creditors.

Johns et al. v. *Barbour et al*..... 43

INSOLVENT ACT OF 1875.

1. The defendant placed a writ of attachment in the hands of the plaintiff as official assignee under the Insolvent Act of 1875, who after the creditors' meeting gave defendant notice of taxation. Defendant attended the taxation, and, at his instance, some of the items were struck off. The balance of the amount, as taxed by the Judge for the costs of the official assignee down to the appointment of the creditor's assignee, defendant promised to pay. An action was brought by the plaintiff for the amount, and judgment was given for the plaintiff by the County Court Judge, which, on appeal, was reversed, judgment below being entered for defendant.

Greenfield v. *Yorke* 19

2. The insolvent, T. J. B., being indebted to the Merchants' Bank, made an arrangement in pursuance of which he addressed a letter to the Accountant of the Railway Department on October 22, 1878, instructing him to send any cheque coming to him from the Department to the care of Maclean, Cashier of the Bank. The Cashier received the letter, which was addressed to the insolvent, care of Merchants' Bank, and, having removed the cheque, which he endorsed, "T. J. B., per George Maclean, agent for Merchants' Bank, guaranteed," &c., drew the money without authority from the insolvent, and refused to pay it over. At the time of the arrangement in 1878, T. J. B. was in insolvent circumstances, with notes lying overdue at the Merchants' Bank, and judgments recorded against him.

Held, that the arrangement was made in contemplation of insolvency, and was within the provisions of section 133 of the Act of 1875, and that the assignee was entitled to the full amount received by the defendant Bank, with costs.

Creighton, Assignee, v. *Merchants' Bank et al.* 139

3. On an application to confirm a deed of composition and discharge under the Insolvent Act of 1875, a creditor appeared to oppose the discharge, who had not filed his claim, though he was mentioned in the list annexed to the affidavit accompanying the insolvent's petition, and notice of the application had been sent to him.

Held, that the claimant was a creditor within the meaning of the Act for the purpose of opposing the discharge.

In Re Creighton, 1 R. & G., 211, overruled.

In re John Bauer 149

4. An order was made by the County Court Judge in an insolvent matter under the Act of 1875, for the purpose of appealing from which the insolvent, within eight days from the making of the order, filed a bond approved of by the Judge, and obtained from him an order giving leave to appeal to this Court. No further proceedings were taken in this Court within the eight days.

Held, that the appellant had not "adopted proceedings on the said appeal" within the meaning of section 128 of the Act, and that the alleged appeal must be quashed.

In Re David Buckley 154

5. Plaintiffs, being creditors of the defendant, an insolvent, executed a composition deed under the provisions of the Insolvent Act and received their composition, payable in several instalments, on a claim filed in September, 1876, shewing a balance of $2,036, after giving credit for a "note endorsed by T. Coffin." After the time for payment of the composition elapsed plaintiffs filed a second claim containing substantially the same debits, but omitting the credit of the note endorsed by T. Coffin & Co. The total amount of the debits in the second claim was $2,831, from which plaintiffs

deducted $2,036, the amount of the first claim, leaving a balance of $795. Plaintiffs recovered a verdict for the composition on this amount.

Held, that in filing the first claim, on which the Coffin note was credited, and receiving a composition on the claim as thus filed, plaintiffs had waived the right to demand a composition on the sum that would have been due if they had not given credit for the Coffin note.

Anderson et al. v. *Sutherland et al*..... 356

6. The City of Halifax has no preferential claim for taxes against the assignee under the Insolvent Act of 1875.

In Re Marter..... 412

See also DEMAND AND REFUSAL IN TROVER.

INSOLVENT DEBTORS, RELIEF OF.

See PRACTICE, Appeal from Commissioners.

INSURABLE INTEREST.

See AWARD.

INSURANCE, FIRE.

Under conditions, in a policy of fire insurance for $400, requiring that in claiming for a loss the whole actual cash value of the property insured should be declared, and providing that any fraud or false swearing should vitiate the claim, defendants pleaded that plaintiff delivered a false and fraudulent account of the alleged loss, and that the defendant had declared the building destroyed to be worth $600, to induce the defendants to pay him $400, whereas the building was not of that value, and plaintiff had not suffered damage to that extent, as the insured well knew.

Held, that the defence was sufficiently pleaded.

Gastonguay et al. v. *Sovereign Fire Ins. Co.* 334

———————, MARINE.

A vessel was stranded at the mouth of Shelburne Harbor, which she was seeking to enter under stress of weather, being on a voyage from Sydney, C. B. to Boston. The harbor was frozen for four miles from the town, and the hull, rigging and hawsers were encumbered with ice. Her steering apparatus parting, she struck on the rocks and became stranded early in the morning of Saturday, at nearly high water. Notice of abandonment was given in Halifax on behalf of the owners on the evening of the following Monday, to which the underwriters replied declining to accept it without further particulars, and the vessel was sold on Tuesday, after the master had communicated with the owners. Evidence was given that the tide did not suit on Saturday to make any effectual attempt to float the vessel, and that the drift ice prevented getting out more than one anchor; and there was evidence that all that was useful had been done on that day, that on Saturday night she filled with water, and that on Sunday, a gale coming on, she was bilged. On Monday a winter gale was blowing with heavy sea breaking over the vessel, so that the crew could not survive on board. The vessel was grinding on the bottom and was in danger of going to pieces, so that experienced people thought she was in a hopeless condition. Afterwards, by the aid of a favorable tide, and by a vessel, not available when

the notice of abandonment was given, she was got off and repaired. The Judge who tried the cause without a jury, found for plaintiff, and the Court refused to set the verdict aside.
Corbett v. *Providence Washington Insurance Co*..... 109

See MONEY PAID, Action for.

See also AWARD.

INTEREST, DISQUALIFICATION OF JUSTICE BY.

The defendant was convicted before F. A. Laurence, Stipendiary Magistrate, presiding in the Town Court of Truro, of selling liquors contrary to law. The Stipendiary Magistrate was a rate-payer of the town, and received a fixed salary as Stipendiary, payable out of the funds of the town to which half the penalty imposed became payable.
Held, that the Magistrate was disqualified by interest from acting in the matter.
Tupper v. *Murphy*..... 173

INTOXICATING LIQUORS, CHARGES FOR, IN ACCOUNT.

In an action on the common counts, the County Court Judge nonsuited the plaintiff on the ground that items for intoxicating liquors in quantities of less than one gallon were in plaintiff's claim, though not included in the account sued on. Plaintiff, on the appeal, claimed that he should have judgment, having proved his particulars at the trial, but the Court refused it, and granted simply the usual order allowing the appeal.
McGowan v. *Holden*..... 266

IRREGULAR APPEAL.

See PRACTICE, Appeal from County Court.

IRREGULARITY IN APPEAL.

See PRACTICE, Appeal from County Court.

JOINDER.

An action was brought to recover $100 placed by plaintiff in the hands of the defendant for the purpose of betting on a boat race. The bet was made in the plaintiff's name, but the money was contributed by several parties in small sums, and, although no arrangement was made, plaintiff stated in his evidence that the several parties were interested to their respective amounts, and if he had won they would have expected their money and he would have been obliged to pay them. Plaintiff countermanded the bet before the defendant parted with the money, and there was no clear evidence to shew that defendant, as betting agent for plaintiff, had become bound before the bet was so countermanded.
Held, that the contributors could not sue jointly, but that plaintiff was entitled to recover back, not the whole amount, but only his own share of the money deposited, for which judgment must be entered in the Court below.
Ross v. *Harrington*..... 325

JUDGMENT BY DEFAULT, OPENING.

See PRACTICE—Opening judgment.

JUSTICE OF THE PEACE, REFUSING APPEAL.

See APPEAL, ACTION FOR REFUSING.

JURY, FUNCTIONS OF.

See EVIDENCE, VERDICT AGAINST.

LANDLORD AND TENANT.

See per JOHNSTONE, J., p. 159.

LICENSE LAW.

See PRACTICE, Certiorari.

LUGGAGE DAMAGED ON STEAMSHIP.

See NEGLIGENCE.

MAGISTRATE, DISQUALIFIED BY INTEREST.

The defendant was convicted before F. A. Laurence, Stipendiary Magistrate, presiding in the Town Court of Truro, of selling intoxicating liquors contrary to law. The Stipendiary Magistrate was a rate-payer of the town, and received a fixed salary as Stipendiary, payable out of the funds of the town to which half the penalty imposed became payable.

Held, that the Magistrate was disqualified by interest from acting in the matter.

Tupper v. *Murphy* 173

MARINE INSURANCE.

See INSURANCE, MARINE.

MISDIRECTION.

See DELIVERY OF DEED, &c.

See also EVIDENCE, conflicting, left to jury, &c.

MONEY DEPOSITED WITH BETTING AGENT, ACTION FOR.

An action was brought to recover $100 placed by plaintiff in the hands of the defendant for the purpose of betting on a boat race. The bet was made in the plaintiff's name, but the money was contributed by several parties in small sums, and, although no arrangement was made, plaintiff stated in his evidence that the several parties were interested to their respective amounts, and if he had won they would have expected their money, and he would have been obliged to pay them. Plaintiff countermanded the bet before the defendant parted with the money, and there was no clear evidence to shew that defendant, as betting agent for plaintiff, had become bound before the bet was so countermanded.

Held, that the contributors could not sue jointly, but that plaintiff was entitled to recover back, not the whole amount, but only his own share of the money deposited, for which judgment must be entered in the Court below.

Ross v. *Harrington* 335

MONEY PAID, ACTION FOR.

Plaintiff's assignor gave his promissory note for the amount of a premium on a policy of marine insurance on a vessel of which said assignor and the defendant, with others, were part owners. The note was never paid and the policy stipulated that in the event of the premium not being paid, the company might cancel it. Plaintiff, as assignee in bankruptcy, sued the defendant for his share of the premium, as money paid.

Held, that whatever might be plaintiff's rights had the note been accepted as a payment and the defendant released, there could be no action for money paid in the present case.

Barclay et al. v. *Gooch*, 2 Esp., 571, distinguished,

Dickie v. *Blenkhorn*..... 387

See also BOND FOR SALE OF LAND.

——— RECEIVED.

See AGENCY 1.

NEGLIGENCE.

Plaintiff brought an action against defendants for injury to her luggage on defendants' steamship, caused by the breaking of a dummy, or side-light, and the alleged negligence of defendants' servants. Conflicting evidence was given on the question of negligence, and a general verdict was found for the plaintiff, which the Court refused to disturb.

Wood v. Allan..... 211

NEWSPAPER, CONTRACT FOR ADVERTISEMENT IN.

See ADVERTISING CONTRACT.

NON-JOINDER.

See PRACTICE, Variance.

NOTICE OF DISHONOR.

A judgment was given for defendant in an action by indorser against indorsee, there being no proof of the contents of a notice said to have been sent by telegraph or of the telegram having been received.

Judgment sustained.

McLean v. *Garnier*..... 276

——— TO MAGISTRATE BEFORE CERTIORARI.

See PRACTICE, Certiorari, 2.

——— TO OVERSEERS OF POOR.

A. B. and C., describing themselves as Overseers of Poor for North River, brought action against D., E. and F., described as Overseers of Poor for Brookfield, for the maintenance of a pauper. The Act of 1876 reduced the number of Overseers to be appointed for townships from five to three, but the Sessions of the defendants' township appointed five, and notice was given to one of the five so appointed, who was not made defendant in the action.

Held, that notice was necessary to enable plaintiff to recover, and that the notice in this case was not given to the proper parties.

McCurdy et al. v. *Harvey et al*..... 249

OPENING JUDGMENT.

See PRACTICE.

OVERSEERS OF POOR.

See NOTICE TO OVERSEERS.

OVERVALUATION IN PROOFS OF LOSS.

See PLEADINGS.

PARTIES.

See PRACTICE.
See also JOINDER.

PARTIES AGGRIEVED BY DECISION OF COMMISSIONER OF MINES.

See APPEAL FROM COMMISSIONER OF MINES.

PAYMENT INTO COURT, PLEA OF.

See PLEADINGS—TENDER.

PLEADINGS.

DEPARTURE.

In an action of trover for logs, defendant pleaded denying plaintiff's property and possession, and plaintiff replied setting up an equitable right to the logs. The Judge at *nisi prius* ruled that there was a departure in the pleading on the part of the plaintiff, who had, in his replication, set up an equitable interest in the property, instead of the legal right asserted in his declaration; and he directed the jury to find a verdict for defendant, which they did. The Court refused to set aside the verdict, SMITH, J., holding that there was no evidence of property in the plaintiff; WEATHERBE, J., that the replication was only a reply to a bad plea as shown by the pleadings, q. v.

Christie v. *Thomas* 203

OVERVALUATION, PLEA OF.

Under conditions, in a policy of fire insurance for $400, requiring that in claiming for a loss the whole actual cash value of the property insured should be declared, and providing that any fraud or false swearing should vitiate the claim, defendants pleaded that plaintiff delivered a false and fraudulent account of the alleged loss, and that defendant had declared the building destroyed to be worth $600, to induce the defendants to pay him $400, whereas the building was not of that value, and plaintiff had not suffered damage to that extent, as the insured well knew.

Held, that the defence was sufficiently pleaded.

Gastonguay et al. v. *Sovereign Fire Insurance Company* 334

SECOND PLEA WITHOUT LEAVE.

See head-note p. 270.

PLEADINGS.

TENDER, PLEA OF.

Plaintiff claimed in his writ $100. Defendant pleaded a tender of $58.23 in the usual form, alleging that it was sufficient. Plaintiff replied denying the tender, denying that the amount was sufficient, and denying that plaintiff was always ready, alleging a demand and refusal of the amount. No evidence was given that the money had been paid into Court, though it was so alleged in the plea. The Judge of the County Court found that $58.23 was due, and that the tender was not good, not having been made to a person authorized to receive it. Defendant appealed on the ground that the plaintiff having denied that the amount paid in was sufficient, and the Judge, having found that it was, the judgment should have been for the defendant.

Held, that the plea was properly treated as a plea of tender, and the Judge having found that no valid tender was made, judgment was properly given for the plaintiff, and the appeal must be dismissed with costs.

Outram v. *Taylor*..... 158

TRESPASS.

To an action of trespass to land defendant pleaded among other pleas, that the land was not plaintiff's as alleged. The verdict was for plaintiff.

Held, by McDONALD, C. J., and WEATHERBE, J., that the plaintiff's possession was put in issue by the plea.

By McDONALD and JAMES, J J., that the possession should have been specifically denied, and the plea was not sufficient.

The Court being equally divided on the rule for new trial, the rule dropped.

Embree v. *Noiles*..... 82

POLICE COURT, JURISDICTION OF.

See CITY COURTS.

POLICY OF INSURANCE, CONDITION IN.

See INSURANCE, FIRE.

———————, GARNISHEEING.

See GARNISHEE ORDER, &c.

PORT OF REGISTRY.

See ASSESSMENT OF SHIPPING.

POSSESSION, PLEA TO RAISE QUESTION IN TRESPASS.

See PLEADINGS, TRESPASS.

———————, TITLE BY.

In an action of trespass plaintiff, apart from his evidence of title, relied on possession for a long period of years, the acts of possession consisting of the construction of a system of canals, (several of them inside of the line claimed by defendant,) connected on the one side with lakes, and on the other with a Bay of Fundy river, by which the lands in controversy were flooded twice a day, and the surface

of the land eventually raised, thus converting the land from a "useless swamp, which could only be crossed by a team when frozen, to firm, productive and valuable land."

Held, that plaintiff was entitled to recover under this evidence.

McCully v. *Blair* 435

PRACTICE.

AMENDMENT REFUSED AFTER VERDICT.

After a general verdict for plaintiff in an action on a policy of insurance, defendant moved at the argument to add a plea setting up the defence that the action had not been brought within six months, as required by the conditions of the policy. The amendment was refused. See *2 R. & G.*, 300.

Caldwell v. *Stadacona Insurance Company* 218

APPEAL FROM COMMISSIONERS.

1. A debtor was imprisoned on process issued out of the County Court, and was brought before Commissioners, who ordered his discharge. An appeal was taken to a court organized under the Act of 1880, chapter 2, section 111, but the order, though made by the Clerk of the County Court, was signed by him as Prothonotary. The proceedings were brought up by *certiorari*, and a rule taken to quash the *certiorari*, on the ground, among others, that, as the special court had not been regularly organized, it had no jurisdiction, and *certiorari* would not lie.

   Held, that the *certiorari* must be quashed. See *O'Connor* v. *Condon*, p. 2, *note*.

Fletcher v. *Chisholm* 1

2. Defendant was imprisoned in the county jail under process issued out of the County Court, and detained under an order of Commissioners for the relief of Insolvent Debtors. An application was made to this Court *in banc* for a summons to have the prisoner brought up by way of appeal.

   Held, that the Court had no jurisdiction to hear the case, not having met within ten days from the date of the order from which the appeal was sought.

Brookfield v. *Symes* 17

APPEAL FROM COUNTY COURT.

1. Where a cause was tried at the County Court Chambers, December 5th, 1879, judgment pronounced December 26th, 1879, and a motion for appeal made on the last day of the January term of the County Court, 1880, which was refused,

   Held, that the appellant had not brought himself within the terms of the County Court Act of 1877, and that the appeal from the decision of the County Court Judge, refusing the appeal, must be dismissed.

McDonald v. *Vaux* 15

2. A rule *nisi* was taken April 2nd, 1881, to strike a cause off the docket on the grounds that the papers were not on file, and that the cause had originated in the City Court, and the amount in dispute was less than $40, being only $10.50. It was shewn by affidavit on the argument of the rule that the reason why the papers were not on file was that an application was pending in the Court below to amend the minutes. The rule *nisi* was, after argument, discharged. Another rule *nisi* was taken out (December 14th, 1881,) to strike off the cause and dismiss the appeal on the same grounds as before.

The papers were not on file at the time of taking out the rule *nisi*, but were filed before the argument.

Held, that this was not sufficient, and that the appeal must be dismissed.

Bossom v. *Coombes* 25

3. Appellant allowed to enter cause, on payment of costs of rule to dismiss appeal for non-entry, where the failure to enter it resulted from misunderstanding between counsel engaged.

Johnston v. *McLean* 31

4. A rule for an appeal from the ruling of a Judge refusing to allow an examination of an agent in regard to certain matters, under the Absconding Debtors' Act, was taken in the following form:—It is ordered that an appeal be taken from the ruling of the presiding Judge given at the examination, etc., on the grounds, etc., and that a re-hearing of said agent be had, unless cause to the contrary be shewn before the Supreme Court *in banco* at Halifax, within the first four days of the next ensuing term.

Appeal dismissed.

Dobsen v. *McDonald* 127

5. Plaintiff sued in the County Court on a bail-bond given by the three defendants, who pleaded and proved that the execution had been returned before the expiration of the sixty days within which it was made returnable. The County Court Judge held that this was a mere irregularity, not touching the merits, and could not be taken advantage of by plea, and he gave judgment against the three defendants. Defendants appealed, and in the appeal bond recited the judgment as a judgment against two of the defendants.

Held, that the appeal was irregular, and that a motion was properly made in this Court to set it aside, though the papers had been certified and the bond approved by the County Court Judge.

Watson v. *Heney* 131

6. In a cause under $40, the County Court Judge granted an appeal in the following form: "On hearing read, &c., &c., and on motion, I do order that A. B. have leave to appeal, and an appeal is hereby granted from my decision, &c., to the Supreme Court, on the following grounds." Three grounds were stated, the first being in general terms, the other two pointing distinctly to the objections relied on.

Held, that under section 14 of chapter 9 of 1878 the appeal, being in a cause under $40, should shew on its face that it was granted in the discretion of the Judge, and not as an ordinary appeal, and that the rule for appeal was insufficient.

McEwan v *Outram* 209

7. An action was brought in the Magistrates' Court, and judgment given for plaintiff. The County Court Judge, on appeal, decided that the question of title was involved, and the Court was therefcre "excluded from jurisdiction."

Held, that an appeal lay to the Supreme Court from the decision.

Creighton v. *Lindsay* 243

8. In an action on the common counts, the County Court Judge nonsuited the plaintiff on the ground that items for intoxicating liquors in quantities of less than one gallon were in plaintiff's claim, though not included in the account sued on. Plaintiff, on the appeal, claimed that he should have judgment, having proved his particulars at the trial, but the Court refused it, and granted simply the usual order allowing the appeal.

McGowan v. *Holden* 266

9. The Court dismissed an appeal for irregularity in the form of the rule, and granted a rule directing the Clerk of the County Court to enter up judgment in the County Court for the plaintiff. On appeal from a decision discharging a rule *nisi* to set the judgment aside,

Held, that the order of this Court for entering up judgment was in excess of jurisdiction, and the Clerk of the County Court had no authority to enter up judgment.

Huestis v. *Lyons* 284

PRACTICE.

APPEAL, JUDGMENT ON.

The Court dismissed an appeal, for irregularity in the form of the rule, and granted a rule directing the Clerk of the County Court to enter up judgment in the County Court for the plaintiff. On appeal from a decision discharging a rule *nisi* to set the judgment aside,

Held, that the order of this Court for entering up judgment was in excess of jurisdiction, and the Clerk of the County Court had no authority to enter up judgment.

Huestis v. *Lyons* 284

ATTACHMENT.

The affidavit for attachment against defendant, as an absconding debtor, set out that defendant was indebted to plaintiff in the sum of $82.82, for that plaintiff, by his promissory note, &c., promised to pay plaintiff, as guardian, $56.70, with interest, &c.; also that defendant was indebted to plaintiff *for expenses in connection with said note.*

Held, that, as there was nothing in the expression as to expenses to indicate a legal liability, the affidavit of a cause of action in that respect was not sufficient, but that a distinct "cause of action" was shewn, and could be gathered from the affidavit, to the amount required for an attachment, and, although the writ was not endorsed for the amount so shewn, but for a larger amount, (*i. e.*, including the expenses,) the attachment could not be set aside on that ground.

The endorsement of the amount need not be signed by the Commissioner, nor the writ allowed; McDONALD, C. J., dissenting as to the necessity of signing the endorsement.

McDonald v. *Fraser* 293

BAIL, OBJECTION TO, TOO LATE.

A preliminary objection was taken at the argument that the bail was defective.

Held, that under the present system of printed cases the objection was too late.

Per RIGBY, J.—That, as the material necessary to enable the Court to consider the objection was not included in the case as furnished, the objection was not open to the plaintiffs.

McDonald et al. v. *McMaster* 372

CERTIORARI.

I. A debtor was imprisoned on process issued out of the County Court, and was brought before commissioners, who ordered his discharge. An appeal was taken to a court organized under the Act of 1880, chapter 2, section 111, but the order, though made by the Clerk of the County Court, was signed by him as Prothonotary. The proceedings were brought up by *certiorari*, and a rule taken to quash the *certiorari*, on the ground, among others, that as the special court had

not been regularly organized, it had no jurisdiction, and *certiorari* would not lie.

Held, that the *certiorari* must be quashed. See *O'Connor* v. *Condon*, p. 2, *note*.

Fletcher v. *Chisholm* 1

2. The *certiorari* was attacked on the ground that no notice had been given to the magistrate, as required by *Imperial Statute*, 13 Geo. II., chapter 18, but no such ground was taken in the rule.

Held, that this ground could not be taken at the argument. *Quære*, whether the rule requiring notice applied to this case, where the justice acted as a special statutory court, and not simply as a justice of the peace.

The ground was also taken that the affidavit required by chapter 12 of the Acts of 1879, (stating that the defendant had not sold intoxicating liquors within six months contrary to law,) had not been made.

Held, that the statute did not apply where the proceedings were *coram non judice*.

Held, further, that in cases such as the present (q. v.) *certiorari* would lie after judgment, notwithstanding the general rule that in civil cases *certiorari* will not lie after judgment.

Held, further, over-ruling *Crawley* v. *Anderson*, 1 Gel. & Ox., 385, that it is no objection to the writ of *certiorari* that an appeal also would lie.

The ground was taken in the rule to quash the *certiorari* that the bond filed was irregular and bad in substance and form.

Held, that under this ground the objection could not be taken that a bail-piece should have been filed instead of a bond.

Tupper v. *Murphy* 173

PRACTICE.

CONSENT RULE REFERRING EVIDENCE TO THE COURT.

A cause was tried at Sydney, and not concluded when the Court adjourned. A rule was then made, consented to by the counsel and attorneys of both parties, ordering that, in addition to the evidence taken before the Court, further evidence should be taken at Sydney before a Judge or a person named in the rule, and at Halifax before a Master, in the manner set out in the rule, that all the evidence should be filed with the Prothonotary at Halifax, and the cause should be heard upon such evidence before the Court sitting *in banc* at Halifax, and that the Court should have power to refer any matter of account in said cause to a Master or referee for his report, which report the Court might confirm, reject, or utilize, as it should see fit, and enter up judgment for either of the parties; and it was further ordered that the Court should have power to make all and any orders, and do all things necessary for the purpose of finally disposing of the cause.

Held, that the Court had no jurisdiction to hear the cause under the rule.

Gisborne v. *Cape Breton Company, (Limited)* 27

COSTS OF APPEAL.

Per RIGBY, J.—Costs do not follow, as a matter of course, where the appeal is sustained.

Per WEATHERBE, J.—Costs of the appeal follow, as a matter of course.

In Re Appeal Stephen Sweet 397

PRACTICE.

COUNSEL.

Associated counsel has no right to be heard if, on the opening, the Court deems it unnecessary to call upon respondent.

Hubley v. *Boak* 239

DEFAULT, JUDGMENT BY.

In an action on a bond for $400, at the suit of the Crown against the principal and one of the sureties, the defendants pleaded more than one plea without leave, and the plaintiff's attorney, treating the plea as a nullity, on the ground that the Crown was not bound by section 178 of the *Practice Act*, (allowing a second or subsequent plea,) marked default, and, without filing any record, entered judgment without an assessment of damages, upon which execution was issued, endorsed to levy for a sum less than eighty dollars.

Held, on appeal from the County Court, that the judgment was properly set aside by the County Court Judge.

The Queen v. *Hawes et al.* 270

EQUAL DIVISION OF COURT.

Where the Court was equally divided on a rule for new trial the rule dropped.

Embree v. *Noilles* 82

EXECUTION RETURNED BEFORE SIXTY DAYS.

See *Watson* v. *Heney* 131

FILING PAPERS ON APPEAL.

See supra APPEAL FROM COUNTY COURT.

GROUNDS IN RULE.

The ground was taken in the rule to quash the *certiorari* that the bond filed was irregular and bad in substance and form.

Held, that under this ground the objection could not be taken that a bail-piece should have been filed instead of a bond.

Tupper v. *Murphy* 173

INDORSEMENT ON WRIT OF ATTACHMENT.

See supra ATTACHMENT.

NON PROS, PROCEEDING TO TRIAL AFTER.

See post NULLITY.

NULLITY.

After notice of *non pros* a peremptory undertaking was given for the next term at Pictou; but plaintiff failed to try his cause. Defendants' counsel moved for judgment of *non pros*, and the Judge took the papers and reserved his decision. After the Court had closed at Pictou, the Judge was applied to for his decision at another Court, and initialled the rule for judgment, upon which the judgment was signed by the Prothonotary at Pictou. Plaintiff, treating the

judgment as a nullity, proceeded to tne trial, in which defendant took no part.

Held, that the plaintiff could not, under the circumstances, proceed to trial, and the verdict must be set aside.

Fraser v. *Fraser et al*..... 128

PRACTICE.

OBJECTION TO BAIL.

See supra BAIL, Objection to.

OPENING JUDGMENT BY DEFAULT.

Judgment by default was set aside in an ejectment suit where the affidavits disclosed a defence on the merits without alleging in terms that the defendants had a defence on the merits, and the want of a plea was accounted for by defendant's attorney swearing that in consequence of an appeal from an order for security for costs in the cause and of several papers in the cause being served on his counsel in Halifax, he was misled as to the position in which the cause stood, and was not aware that the suit was in a position in which judgment could be marked, until a levy was made on defendant's property. Plaintiff's attorney, in reply, swore that the rule absolute setting aside the order for security had been forwarded for service on defendant's attorney, and that for this and other reasons, which he detailed, the statement of the attorney as to his having been misled could not be true.

Held, (WEATHERBE, J. *dubitante*,) that the appeal from the judgment setting aside the default must be dismissed.

DeWolfe v. *Holmes*..... 4

RULE RETURNABLE ON CIRCUIT.

A Judge at Chambers has no power to make a rule *nisi* returnable before the Court on circuit.

Elliott v. *McDonald*..... 283

RULE RETURNABLE BEFORE PRESIDING JUDGE ON CIRCUIT.

A rule to set aside pleas was made by a Judge returnable before "the presiding Judge of this Honorable Court at Guysborough, on the first day of the ensuing October term there," and was argued on the first day of the term after the opening of the Court. Judgment was reserved and afterwards at Halifax the learned Judge who heard the argument made an order absolute setting aside one of the pleas, and then resigned.

Held, that the order must be rescinded on the ground that it was made returnable in Court.

McDonald v. *McDonald*..... 29

VARIANCE.

A bond was made to three obligees, one of whom had died before the action, which was brought by the surviving obligees and the executrix of the deceased obligee. At the trial plaintiffs' counsel obtained leave to strike out the name of the executrix. There was no allegation in the writ of the death of one of the obligees but evidence of the fact was given at the trial.

Held, that the omission in the writ was fatal, and that the verdict by consent for plaintiffs must be set aside.

Black et al. v. *Barss*..... 35

See also PLEADINGS.

PROHIBITION, WRIT OF.

See VICE-ADMIRALTY COURT.

PROMISSORY NOTE.

In an action brought by indorsees of a promissory note signed by defendants as President and Secretary of a company, the Judge of the County Court found that at the date of the note the company was not incorporated, and rejected evidence offered by plaintiff to show that at the time of negotiating the note the company was incorporated.

The judgment for plaintiff was appealed from and the appeal dismissed.

Jardine et al. v. *Rowley et al* 244

See also MONEY PAID, action for.

PUBLIC WHARF.

See head-note p. 290.

QUANTUM MERUIT.

See BUILDING CONTRACT.

QUASHING APPEAL, MOTION IN APPELLATE COURT.

See PRACTICE, Appeal from County Court, 5.

RECORD, PROOF OF BY SECONDARY EVIDENCE.

In an action to revive a judgment, secondary evidence of the record was admitted on proof of loss, and of the entries in the hand of the late Prothonotary in the judgment book, indicating that the roll had been filed and execution issued.

Graham v. *Boak* 286

REGISTRY OF DEED.

To an action of trespass defendant pleaded, justifying under an alleged grant of a right of way. Plaintiff replied excess, and proved that a gate on the property had been removed and torn down in the exercise of the alleged right of way. Plaintiff and defendant both claimed their adjoining lots by conveyance from the same grantor, and defendant relied on the fact that his deed, which comprised the grant of the right of way over plaintiff's land, had been registered long previously to the registry of plaintiff's deed, but no evidence was given as to the registry or the date thereof.

Held, per JAMES, J., that under the decision in *Gould* v. *McGregor*, 1 R. & G., 339, the certificate should have been tendered, and proved if objected to, and further, that plaintiff was entitled, under the evidence, to hold his verdict on the ground of excess.

Per WEATHERBE, J., that the *locus* of the trespass had not been identified by defendant with the way as described in his deed.

McDONALD, J., dissenting.

McCormack v. *Dennison* 71

——— NOT PRIMA FACIE PROOF OF DELIVERY.

See DELIVERY OF DEED, &c.

RE-LETTING PREMISES.

See TENANCY, Determination of.

RENT, RECOVERY OF.

See TENANCY, Determination of.
See also USE AND OCCUPATION.

REPRESENTATION AS TO CREDIT.

In an action on the case for false representations by defendant of the credit of one Higgins, plaintiff's only evidence as to defendant's knowledge of the position of Higgins consisted of the fact that he had a trust deed from Higgins of all his real estate, and the statement of Higgins that defendant was aware of his position. The goods were purchased on a three months' credit, and it was in evidence that at the end of the time Higgins had more than sufficient property to meet the claim. The Court refused, on appeal, to reverse the judgment for defendant.

Tupper v. *Crowe* 261

RESERVE, DOMINION NOTES HELD AS, ASSESSABLE.

See BANKS, Taxation of.

RIGHT OF WAY.

See REGISTRY OF DEED.

RULE REFERRING EVIDENCE TO COURT.

See PRACTICE, Consent Rule.

—— RETURNABLE ON CIRCUIT.

See PRACTICE, Rule, &c.

SALE, JUSTIFIABLE.

See INSURANCE, MARINE.

SCIENTER IN ACTION FOR FALSE REPRESENTATION.

See REPRESENTATION AS TO CREDIT.

SECONDARY EVIDENCE OF RECORD.

See RECORD.

SECOND CLAIM AGAINST INSOLVENT ESTATE, FILING.

See INSOLVENT ACT OF 1875-5.

SET-OFF RAISING QUESTION OF TITLE.

Where a Court has no jurisdiction to try a question of title, defendant cannot oust the jurisdiction to entertain a claim involving no question of title, by pleading a set-off that involves a question of title.

Creighton v. *Lindsay* 243

SHIPPING, ASSESSMENT OF.

See ASSESSMENT OF SHIPPING.

SHIPS, TAXATION OF.

See ASSESSMENT OF SHIPPING.

STEAMSHIP, DAMAGE TO LUGGAGE ON.

See NEGLIGENCE.

SUMMARY CONVICTIONS.

See CITY COURTS.

SURPRISE, NEW TRIAL ON GROUND OF.

See FRESH EVIDENCE.

SURRENDER, BY RELETTING PREMISES.

See TENANCY, DETERMINATION OF.

TAXATION OF BANKS.

See BANKS.

———— OF SHIPPING.

See ASSESSMENT OF SHIPS.

TAXES, LIABILITY OF TENANT FOR.

See Per JOHNSTONE, J., p. 159.

————, LIEN FOR.

See INSOLVENT ACT OF 1875–5.

TELEGRAPH, NOTICE OF DISHONOR BY.

See NOTICE OF DISHONOR.

TENANCY, DETERMINATION OF.

Defendant, being a yearly tenant, left before the end of his term, and plaintiff re-let the premises to another. Plaintiff then sought to recover rent from defendant for one of the quarters of the unexpired portion of the term, giving credit for the amount received from the tenant to whom he had re-let. There was no evidence or finding of a consent or request from the defendant to whom he had re-let.

Held, that the plaintiff could not recover.

Matthias v. *Pace* 366

TENDER, PLEA OF.

See PLEADINGS.

TITLE, QUESTION OF RAISED IN SET-OFF.

See SET-OFF.

TRESPASS.

1. To an action of trespass to land defendant pleaded among other pleas, that the land was not plaintiff's as alleged. The verdict was for plaintiff.

Held, by McDONALD, C. J., and WEATHERBE, J., that the plaintiff's possession was put in issue by the plea.

By McDONALD and JAMES, J J., that the possession should have been specifically denied, and the plea was not sufficient.

The Court being equally divided on the rule for new trial, the rule dropped.

Embree v. *Noiles* 82

2. To an action of trespass defendant pleaded, justifying under an alleged grant of a right of way. Plaintiff replied excess, and proved that a gate on the property had been removed and torn down in the exercise of the alleged right of way. Plaintiff and defendant both claimed their adjoining lots by conveyance from the same grantor, and defendant relied on the fact that his deed, which comprised the grant of the right of way over plaintiff's land, had been registered long previously to the registry of plaintiff's deed, but no evidence was given as to the registry or the date thereof.

Held, *Per* JAMES, J., that under the decision in *Gould* v. *McGregor*, 1 R. & G., 339, the certificate should have been tendered, and proved if objected to, and further, that plaintiff was entitled, under the evidence, to hold his verdict on the ground of excess.

Per WEATHERBE, J., that the *locus* of the trespass had not been identified by defendant with the way as described in his deed.

McDONALD, J., dissenting.

McCormack v. *Dennison* 71

TROVER.

See DEMAND AND REFUSAL.

ULTRA VIRES.

See VICE-ADMIRALTY COURT.

USE AND OCCUPATION.

Plaintiff brought action for use and occupation of premises by defendant who was assignee of one McCleeve. The alleged use consisted in allowing machinery of the insolvent (McCleeve) to remain on the premises. Plaintiff had requested the defendant not to sell the machinery by tender, stating that he would make a better offer than anyone else; and the first notice that defendant had to remove the machinery was in September, 1879. The machinery was removed in February, 1880,—but the County Court Judge held that the agreement between plaintiff and defendant being contingent, and having fallen through, plaintiff was entitled to recover for the whole period, and he allowed $200.

Held, that plaintiff could only recover for the period after the agreement fell through, that the appeal must be sustained, and judgment entered below for plaintiff for $80 for the use of the premises from September to February, being at the same rate allowed by the County Court Judge.

Brennan v. *Jack* 365

VERDICT, SETTING ASIDE.

See EVIDENCE, VERDICT AGAINST.

VICE-ADMIRALTY COURT.

The legislation of the Dominion Parliament (31 Vic. C. 8, S. 156,) giving the Vice-Admiralty Court jurisdiction in cases for the collection of penalties for illegal distilling, is *ultra vires*, and the Vice-Admiralty Court, as an inferior Court, may be restrained by the Supreme Court by a writ of Prohibition.

Attorney-General of Canada v. *Flint et al.* 453

WAIVER.

See INSOLVENT ACT OF 1875-5.

—— —— OF CONDITION.

See INSURANCE, Fire.

WHARF, USE AND OCCUPATION OF.

Plaintiff brought suit for use and occupation of a wharf. Defendant pleaded never indebted, and gave evidence that part of the wharf was built on a public landing over which the public had for a long period been accustomed to pass for the purpose of landing fish from their boats. Defendant contended also that plaintiff could not build a public wharf, without leave from the Crown. The Judge charged for plaintiff, and the jury found for defendant, but the verdict was set aside with costs.

Lindsay v. *Creighton et al.* 290

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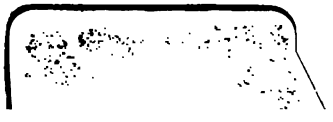
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